CHAPTER IV

VIOLATIONS

A. Basis of Violations.

1. Standards and Rules. Section 396-6(a) of the Occupational Safety and Health Law states that no employer shall require or direct or permit or suffer any employee to go or be in any employment which does not comply with occupational safety and health standards promulgated under the Law. The standards and rules are subdivided as described in the following example.

Part-1
Chapter-74
Section-§12-74-2
Subsection-§12-74-2(h)
Paragraph-§12-74-2(h)(2)
Subparagraph-§12-74-2(h)(2)(C)
Clause-§12-74-2(h)(2)(C)(iii)
Subclause-§12-74-2(h)(2)(C)(iii)(g)

NOTE: The most specific subdivision of the standard shall be used for citing violations.

a. Definition and Application of Horizontal and Vertical Standards. Horizontal standards are developed for application across industry lines, and address circumstances and conditions that will be similar even though encountered in a variety of industries. Vertical standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Within both horizontal and vertical standards, there are general standards and specific standards.

(1) General standards are those which address a category of hazards and whose coverage is not limited to a special set of circumstances.

(2) Specific standards are those which are designed to regulate a specific hazard and which set forth the measures that the employer must take to protect employees from that particular hazard.

(3) There are two types of vertical standards:

(a) Standards that apply to particular industries (Construction), and standards that apply to particular subindustries; and

(b) Standards that state more detailed requirements for certain types of operations, equipment, or equipment usage than are stated in another (more general) standard in the same part.

(4) If a compliance officer is uncertain whether to cite under a horizontal or a vertical standard when both apply, the supervisor shall be consulted. The following general guidelines apply:

(a) When a hazard in a particular industry is covered by both a vertical standard and a horizontal standard, the vertical standard shall take precedence. This is true even if the horizontal standard is more stringent.

(b) If the particular industry does not have a vertical standard that covers the hazard, then the compliance officer shall use the horizontal (general industry) standard.

(c) When a hazard within general industry is covered by both a horizontal (more general) standard and a vertical (more specific) standard, the vertical standard takes precedence. For example, in §12-80-4 the requirement for point of operation guarding for swing saws is more specific than the general machine guarding requirements contained in §12-80-2. However, if the swing saw is used only to cut material other than wood, §12-80-2 is applicable.

(d) In addition, industry vertical standards take precedence over equipment vertical standards. Thus, if the swing saw is in a sawmill, the more specific standard for sawmills is Chapter 12-77 rather than §12-80-4.

(e) In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether or not there is a conflict or inconsistency between the standards, a careful analysis of the intent of the two standards must be performed. The results of the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

(f) When determining whether a horizontal or a vertical standard is applicable to a work situation, the compliance officer shall focus
attention on the activity in which the employer is engaged at the establishment being inspected rather than the nature of the employer's general business.

b. Violation of Variances. The employer' s requirement to comply with a standard may be modified through granting of a variance, as outlined in §396-4(a)(3) of the Law and chapter 53 of the rules.

(1) An employer will not be subject to citation if the area of possible violation is in compliance with either the granted variance or the controlling standard. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard and the variance rule shall be cited.

(2) If, during the course of a compliance inspection, the compliance officer discovers that the employer has filed an application for variance regarding a condition which is determined to be an apparent violation of the standard, this fact shall be reported to the supervisor who will obtain information concerning the status of the variance request.

2. General Duty Requirement. Section 396-6 of the Law, adopted at §12-60-2 and §12-110-2, requires that "Every employer shall furnish to each of his employees employment and a place of employment which are safe as well as free from recognized hazards."

a. Evaluation of Potential General Duty Section Situations. In general, Appeals Board and court precedent has established the following elements as necessary to prove a violation of the general duty section.

(1) The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed.

(2) The hazard was recognized:

(a) Industry recognition; or

(b) The employer knew or should have known of the existence of the hazard.

(3) There was a feasible and useful method to correct the hazard.

b. Elaboration of General Duty Section Elements. In the following, the above three elements of a general duty section violation are set forth in greater detail.

(1) A Hazard To Which Employees Were Exposed. A general duty citation must involve both a recognized hazard and exposure of employees.

(a) Hazard. A hazard is a danger which threatens physical harm to employees.

1 Not the Lack of a Particular Abatement Method. In the past some general duty section citations have incorrectly alleged that the violation is the failure to implement certain precautions, corrective measures, or other abatement steps rather than the

failure to prevent or remove the particular hazard. It must be emphasized that the general duty section does not mandate a particular abatement measure; it only requires an employer to render the workplace free of certain hazards by some feasible means.

a In situations where it is difficult to distinguish between a dangerous condition and the lack of an abatement method, the branch manager shall consult with the administrator for assistance in articulating the hazard properly.

EXAMPLE 1. Employees doing sanding operations may be exposed to the hazard of fire caused by sparking in the presence of magnesium dust. One of the abatement methods may be training and supervision. The "hazard" is the exposure to the potential of a fire; it is not the lack of training and supervision.

EXAMPLE 2. In another situation a danger of explosion due to the presence of certain gases could be remedied by the use of nonsparking tools. The hazard is the explosion hazard due to the presence of the gases; it is not the lack of non- sparking tools.

b. Where appropriate, the administrator will consult with the attorney general.

2 The Hazard Is Not a Particular Accident. The occurrence of an accident does not necessarily mean that the employer has violated the general duty section although the accident may be evidence of a hazard. In some cases a general duty section violation may be unrelated to the accident. Although accident facts may be relevant and shall be gathered, the citation shall address the hazard in the workplace, not the particular facts of the accident.

EXAMPLE: A fire occurred in a workplace where flammable materials were present. No employee was injured by the fire itself but an employee, disregarding the clear instructions of her supervisor to use an available exit, jumped out of a window

and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard but the action of the employee may be an instance of unpreventable employee misconduct. The citation should deal with the fire hazard, not with the accident involving the employee who broke her leg.

3 Hazard Must Be Reasonably Foreseeable. The hazard for which a citation is issued must be reasonably foreseeable.

a All the factors which could cause a hazard need not be present in the same place at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited but no ignition source is present or could be present, no §12-51-1 violation would exist. If an ignition source is available at the workplace and the employer has not taken sufficient safety precautions to preclude its use in the confined area, then a foreseeable hazard may exist.

b It is necessary to establish the reasonable foreseeability of the general workplace hazard, rather than the particular hazard which led to the accident.

EXAMPLE: A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

(b) The Hazard Must Affect the Cited Employer's Employees. The employees affected by the general duty section hazard must be the employees of the cited employer.

1 An employer who may have created or controlled the hazard normally shall not be cited for a general duty section violation if that employer's own employees are not exposed to the hazard. Exceptions to this practice may be appropriate in the case of general contractors and subcontractors on a construction site. (See §12-110-2(f).)

2 In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the branch manager shall consult with the administrator and attorney general to determine the sufficiency of the evidence regarding the employment relationship.

3 The fact that an employer denies that exposed employees are his or her employees does not necessarily decide the legal issue involved. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question, who pays these employees, may not be the determining factor.

(2) The Hazard Must be Recognized. Recognition of a hazard can be established on the basis of industry recognition, employer recognition, or "common-sense" recognition. The use of common-sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by satisfactory evidence and adequate documentation in the file.

(a) Industry Recognition. A hazard is recognized if the employer's industry recognizes it. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a general duty section violation. Although evidence of recognition by the employer's specific branch within an industry is preferred, evidence that the employer's industry recognizes the hazard may be sufficient. The branch manager shall consult the administrator on this issue. Industry recognition of a particular hazard can be established in several ways:

1 Statements by industry safety or health experts which are relevant to the hazard;

2 Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;

3 Manufacturer's warnings on equipment, which are relevant to the hazard;

4 Statistical or empirical studies conducted by the employer's industry which demonstrates awareness of the hazard. (Evidence such as studies conducted by the employee representatives, the union or other employees should also be considered if the employer or the industry has been made aware of them.);

5 Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;

6 State and local laws or regulations which apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. (In these cases, however, corroborating evidence of recognition is recommended.);

7 Standards issued by the American National Standards Institute (ANSI), the National Fire Protection Agency (NFPA), and other private standard-setting organizations, if the relevant industry participated on the committee drafting the standards. (Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards which discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. It must be emphasized, however, that these private standards cannot be enforced like Hawaii OSH standards. They are simply evidence of industry recognition, seriousness of the hazard, or feasibility of abatement methods.); or

8 NIOSH criteria documents, the publications of EPA, the National Cancer Institute, OSHA hazard alerts, the Technical Manual, and articles in medical or scientific journals by persons other than those in the industry, if used only to supplement other evidence which more clearly establishes

recognition. (These publications can be relied upon only if it is established that they have been widely distributed in general, or in the relevant industry.)

(b) Employer Recognition. A recognized hazard can be established by evidence of actual employer knowledge. Evidence of this recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the DOSH inspection.

1 Company memorandums, safety rules, operating manuals or operating procedures, and collective bargaining agreements may reveal the employer's awareness of the hazard. In addition, accident, injury, and illness reports prepared for DOSH, worker's compensation, or other purposes may show this knowledge.

2 Employee complaints or grievances to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

3 The employer's own corrective action may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford any significant protection to the employees.

4 Any prior citations issued to the employer regarding the violative condition should be conclusive evidence of recognition.

(c) Common-sense Recognition. If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), recognition can still be established if it is concluded that any reasonable person would have recognized the hazard. This theory of recognition shall be used only in flagrant cases.

EXAMPLE: In a general industry situation, a court has held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings which is 26 feet below and in which unwarned employees work. (In construction, §12-110-2 could not be cited in this situation because §12-122-7 or §12-131-3 applies.)

(3) The Hazard Was Causing or Was Likely to Cause Death or Serious Physical Harm. This element of a §12-60-2 or §12-110-2 violation is virtually identical to the substantial probability element of a serious violation under section 396-10(k) of the Law. Serious physical harm is defined in B.1. of this chapter. This element of a §12-60-2 or §12-110-2 violation can be established by showing that:

(a) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or

(b) If an accident occurred, the likely result would be death or serious physical harm. For example, an employee is standing at the edge of an unguarded piece of equipment, 25 feet above the ground. Under these circumstances if the falling incident occurs, death or serious physical harm (e.g., broken bones) is likely.

(c) In a health context, establishing serious physical harm at the cited levels may be particularly difficult if the illness will require the passage of a substantial period of time to occur. Expert testimony is crucial to establish that serious physical harm will occur for such illnesses. It will generally be easier to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes or is likely to cause death or serious physical harm when such illness or death will occur only after the passage of a substantial period of time:

1 Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels reasonably could occur;

2 Illness reasonably could result from such regular and continuing employee exposure; and

3 If illness does occur, its likely result is death or serious physical harm.

(4) The Hazard May Be Corrected by a Feasible and Useful Method. To establish a general duty section violation the division must identify a method which is feasible, available, and likely to correct the hazard. The information shall indicate that the recognized hazard, rather than a particular accident, is preventable.

(a) If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a general duty section citation

may be issued. A citation shall not be issued merely because the division knows of an abatement method different from that of the employer, if the division's method would not reduce the hazard significantly more than the employer's method. It must also be noted that in some cases only a series of abatement methods will alleviate a hazard. In such a case all the abatement methods shall be mentioned.

(b) Feasible and useful abatement methods can be established by reference to:

1 The employer's own abatement method, which existed prior to the inspection but was not implemented;

2 The implementation of feasible abatement measures by the employer after the accident or inspection;

3 The implementation of abatement measures by other companies;

4 The recommendations by the manufacturer of the hazardous equipment involved in the case; and

5 Suggested abatement methods contained in trade journals, private standards, and individual employer standards. Private standards shall not be relied on in a general duty section citation as mandating specific abatement methods.

a For example, if an ANSI standard deals with the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials which create the gas and the provision of ventilation, the ANSI standard may be used as evidence of the existence of feasible abatement measures.

b The citation for the example given shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to issue a citation alleging that the employer failed to prevent the buildup of materials which could create the gas and

failed to provide a ventilation system as both of these are abatement methods, not hazards.

6 Evidence provided by expert witnesses which demonstrates the feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement method, the evidence shall be used if available.

c. Use of the General Duty Section. The general duty section shall be used only where there is no standard that applies to the particular hazard involved.

(1) The general duty section may be applied in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. An example of a hazard covered only partially by a standard would be a confined space situation where an employee could be subject to an overexposure of an air contaminant under Chapter 202 of the standards or to an atmosphere containing less than 16 per cent oxygen. The latter condition could legitimately be cited under the general duty section with the former cited under the appropriate standard.

(2) The general duty section may be applicable to some types of employment which are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.). Employers involved in these occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards. These steps include anticipation of hazards which may be encountered, provision of appropriate protective equipment, and prior provision of training, instruction, and necessary equipment. An employer who has failed to take appropriate steps on any of these or similar items and has allowed the hazard to continue to exist may be cited under the general duty section (if not covered under a standard).

d. Limitations on Use of the General Duty Section. Sections 12-60-2 or 12-110-2 may not be used if a Hawaii OSH standard applies to the hazardous working condition. Prior to issuing a general duty section citation, the standards must be reviewed carefully to determine if a standard applies to the hazard.

(1) If a standard applies, the standard shall be cited rather than a general duty section. Prior to the issuance of a general duty section citation, a notation shall be made in the file to indicate that the standards were reviewed and no standard applies.

(2) If there is a question as to whether or not a standard applies, the branch manager shall consult with the administrator. The attorney

general will assist the administrator in determining the applicability of the standard.

(3) General duty violations may be cited in the alternative when a standard is also cited to cover a situation where there is doubt as to whether the standard applies to the hazard.

(a) If the issue of the applicability of a specific standard is raised in a subsequent informal conference or notice of contest proceeding, the branch manager shall consult with the administrator, who shall refer to the matter to the attorney general for appropriate legal advice.

(b) If, on the other hand, the issue of the preemption of the general duty clause by a standard is raised in a subsequent informal conference or notice of contest proceeding, the branch manager shall consult with the administrator, who shall refer the matter to the attorney general for appropriate legal advice.

e. Classification of Violations Cited Under the General Duty Section. All hazards alleging violations may be cited under the general duty section (including wilful or repeated violations). General citations shall not be issued for violations based on the general duty clauses.

f. Procedures for Implementation of General Duty Section Enforcement. To ensure that all citations of the general duty section are fully justified, there shall be careful conformity to the following procedures.

(1) Gathering Evidence and Preparing the File. The evidence necessary to establish each element of a general duty section violation shall be documented in the file. This includes all photographs, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes the reasons why it was common knowledge, detectable, and a recognized practice, and supporting statements or reference materials.

(a) If copies of documents relied on to establish the various elements of a general duty section violation cannot be obtained before issuing the citation, these documents shall be accurately quoted and identified in the file so they can be obtained later if necessary.

(b) If experts are needed to establish any elements of the violation, the experts shall be consulted before the citation is issued and their opinions noted in the file. The file shall also contain their addresses and telephone numbers.

(c) The file shall contain a statement that a search has been made of the standards and that no standard applies to the cited condition.

(2) Reserved.

g. Reporting Hazards Not Addressed by a Standard. The supervisor shall evaluate all alleged general duty clause violations to determine if they should be referred to the administrative and technical support branch for the development of new or revised standards. Those violations considered to be candidates for development or revision of a standard shall be forwarded by the compliance branch manager to the administrative and technical support branch manager with appropriate comments, recommendations, and supporting documentation.

3. Employee Exposure. A hazardous condition which apparently violates a Hawaii OSH standard or the general duty clause shall be cited only when the employee exposure can be documented and substantiated. Exposure must have occurred within the 6 months immediately preceding the issuance of the citation in order to serve as a basis for the violation or it must be documented that exposure will occur if the apparent violation remains uncorrected.

a. Definition of Employee. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question, who pays these employees, may not be the determining factor. Determining the employer of an exposed person may be a very complex question, in which case the branch manager shall seek the advice of the attorney general through the administrator.

b. Observed Exposure. Employee exposure is established if the compliance officer witnesses, observes, or monitors exposure of an employee to the hazardous or suspected hazardous condition. Although the use of adequate personal protective equipment does not alter the external conditions of employee exposure, this exposure may be cited only where the standard requires engineering or administrative (including work practice) controls.

c. Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the compliance officer, employee exposure is established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred, continues to occur, or will occur.

(1) Past Exposure. In fatality/catastrophe (or other "accident") investigations, employee exposure is established if the compliance officer determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident. In other circumstances where the compliance officer determines that exposure to hazardous conditions has

occurred in the past, this exposure may serve as the basis for a violation when:

(a) The hazardous condition continues to exist, or it is reasonably predictable that the same or a similar condition could recur; or

(b) It is reasonably predictable that employee exposure to a hazardous condition could recur when:

1 Employee exposure has occurred in the previous 6 months;

2 The hazardous condition is an integral part of an employer's recurring operations; and

3 The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

(2) Potential Exposure. The possibility that an employee could be exposed to a hazardous condition may be cited when the employee can be shown to have access to the hazard. Potential employee exposure could include one or more of these situations.

(a) A hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements and it is reasonably predictable that employee exposure could occur.

(b) A safety or health hazard would pose a danger to employees simply by employee presence in the area and it is reasonably predictable that an employee could come into the area during the course of the work, to rest or to eat at the jobsite, or to enter or to exit from the assigned workplace.

(c) A safety or health hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could use the equipment or be exposed to the hazardous materials in the course of work.

(3) Prevented Exposure. If the investigation reveals an adequately enforced employer policy or program which would prevent employee exposure--including accidental exposure--to the hazardous condition, the compliance officer will document the circumstances but will not propose a citation in the absence of a hazard.

d. Documenting Employee Exposure. The compliance officer shall fully document exposure for every apparent violation. This includes such items as:

(1) Comments by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (especially other employees or members of the exposed employee's family), etc.;

(2) Signed statements;

(3) Photographs; and

(4) Documents (i.e., autopsy reports. police reports. job specifications. etc.).

4. Regulatory Requirements. Violations of part 1 of the standards shall be documented and cited when the employer does not comply with the posting requirements, the recordkeeping requirements, and the reporting requirements of the rules contained in these subparts.

NOTE: If the branch manager becomes aware of an incident required to be reported under §12-52-8 through some means other than an employer report prior to the elapse of the 48-hour reporting period and an inspection of the incident is made, a violation for failure to report does not exist.

5. Hazard Communication. Chapter 12-203 applies to manufacturers and importers of hazardous chemicals even though they themselves may not have employees exposed. Consequently, any violations of that standard by manufacturers or importers shall be documented and cited, irrespective of employee exposure at the manufacturing or importing location. (See Guideline on Hazard Communication Inspection Procedures.)

B. Types of Violations.

1. Serious Violations. Section 396-10(k) of the Law provides" . . .a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

a. The compliance officer shall take four steps to make the determination that a violation is serious. The first three steps determine if there is a substantial probability that death or serious physical harm could result from an accident or exposure relating to the violative condition. (The probability that an accident or illness will occur is not to be considered in determining if a violation is serious.) The fourth step determines whether the employer knew or could have known of the violation.

b. The four-step analysis as outlined below is necessary to make the determination that an apparent violation is serious. Apparent violations of the general duty clause shall also be evaluated on the basis of these steps to ensure that they represent serious violations. The following are the four elements the compliance officer shall consider.

(1) Step 1. The type of accident or health hazard exposure which the violated standard is designed to prevent.

(a) The compliance officer need not establish the exact way in which an accident, or health hazard exposure would occur. The exposure or potential exposure of an employee is sufficient to establish that an accident or health hazard exposure could occur. However, the compliance officer shall note the facts which could affect the severity of the injury or illness resulting from the accident or health hazard exposure.

(b) If more than one type of accident or health hazard exposure exists, the compliance officer shall determine which type could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that determination.

(c) The following are examples of a determination of the type of accident or health hazard exposure which the violated standard is designed to prevent.

1 Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground. The type of accident involves an employee falling from the edge of the floor, 30 feet to the ground below. Section 12-121-3(c)(1) is intended to prevent this type of fall.

2 Employees are observed working in an area in which debris of dangerous type and quantity is located. The type of accident involves an employee tripping on debris with probable puncture or laceration injury. Section 12-122-7(c) is intended to prevent this circumstance from developing.

3 An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to beryllium at .004 mg/m^3. This is .002 mg/m^3 above the PEL of health hazard exposure which could produce diminished physical capacity and possible incapacitation. Section 12-202-4(a) is designed to prevent this exposure.

4 An 8-hour time-weighted sample reveals regular, ongoing employee overexposure to acetic acid at 20 ppm. This is 10 ppm above the PEL of health hazard exposure which could also produce serious harmful effects. Section 12-202-4(a) is designed to prevent this exposure.

(2) Step 2. The type of injury or illness which could reasonably result from the type of accident or health hazard effects identified in Step 1.

(a) In making this determination, the compliance officer shall consider all factors which would affect the severity of the injury or illness which could reasonably be predicted to result from an accident or health hazard exposure. The compliance officer shall not give consideration at this point to factors which relate to the probability that an injury or illness will occur. The following are examples of a determination of the types of injuries which could reasonably be predicted to result from an accident.

1 If an employee falls from the edge of an open-sided floor 30 feet to the ground below, that employee could break bones, suffer a concussion, or experience other more serious injuries.

2 If an employee trips on debris, that employee could experience abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area were littered with broken glass or other sharp objects, it would be reasonable to predict that an employee who tripped on debris could suffer a deep cut which could require suturing.

(b) For conditions involving exposure to air contaminants or harmful physical agent, the compliance officer shall consider the concentration levels of the contaminant or physical agent in determining the types of illness or impairment which could reasonably result from the condition. The Chemical Information Manual, OSHA Instruction CPL 2-2.43 shall be used to determine toxicological properties of substances listed as well as a Health Code Number. A preliminary violation classification shall be assigned in accordance with the instructions given in C.6.b.

(c) In order to support a preliminary classification of serious, DOSH must establish a prima facie case that exposure at

the sampled level would, if representative of conditions to which employees are normally exposed, lead to illness or impairment. Thus the compliance officer must make every reasonable attempt to show that the sampled exposure is in fact representative of employee's exposure under normal working conditions. The compliance officer shall, therefore, identify and record all available evidence which indicates the frequency and duration of employee exposure. This evidence would include:

1 The nature of the operation from which the exposure results;

2 Whether the exposure is regular and on-going or of limited frequency and duration;

3 How long employees have worked at the operation in the past; and

4 If employees are performing functions which can be expected to continue.

5 Whether work practices, engineering controls, production levels and other operating parameters are typical of normal operations.

(d) Where this evidence is difficult to obtain or when it is inconclusive, the compliance officer shall estimate the frequency and duration from the evidence available. In general, if the evidence tends to indicate that it is reasonable to predict that regular, ongoing exposure could occur, the compliance officer shall use this predicted exposure in determining the types of illnesses which could result from the hazardous exposure. The following are examples of determination of types of illnesses which could reasonably result from a health hazard exposure.

1 If an employee is exposed regularly and continually to beryllium at .004 mg/m^3, it is reasonable to predict that berylliosis or cancer could result.

2 If an employee is exposed regularly and continually to acetic acid at 20 ppm, it is reasonable to predict that the illness which could result, viz., irritation to nose, eyes, throat, would not involve serious physical harm.

(3) Step 3. Whether the types of injury or illness identified in Step 2 could include death or a form of serious physical harm.

(a) In making this determination, the compliance officer shall utilize the following definition of "serious physical harm."

1 Serious physical harm is that type of harm which could cause permanent or prolonged impairment of the body or is the type of harm, which while not impairing the body on a prolonged basis, could cause temporary disablement which would warrant medical treatment.

2 Serious physical harm includes any injury or illness that will prevent the injured employee from performing a regular assigned job or duty during the next work shift or day even though the next day may be on a weekend or a holiday.

(b) Types of serious physical harm are:

1 Temporary Total Disability. An injury which causes a person to be unable to perform a regularly assigned job or duty during the next regular work period or shift (a lost-time injury).

2 Permanent Partial Disability. An injury which results in the loss of or the permanent impairment of the use of any body part or function in any degree less than permanent total disability.

3 Permanent Total Disability. Any nonfatal disability which permanently prevents a person from obtaining any gainful employment or which results in the loss of or complete loss of use of:

(a) both eyes;

(b) one eye and one hand, arm, leg, or foot;

(c) two hands, feet, arms, or legs;

(d) a foot, and an arm or the opposite leg; or

(e) a hand, and a leg or the opposite arm.

4 Health Disability. Illnesses that could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body. Some examples of such illnesses include cancer, silicosis, asbestosis, bysinosis, hearing impairment central nervous system impairment and visual impairment. Examples of illnesses which constitute serious physical harm, include:

a Cancer.

b Poisoning (resulting from the inhalation, ingestion or skin absorption of a toxic substance which adversely affects a bodily system).

c Lung diseases, such as asbestosis, silicosis, anthrocosis.

d Hearing loss.

(c) Determinations. The following are examples of determinations of whether the types of injury or illnesses which could reasonably result from an accident or health hazard exposure could include death or serious physical harm:

1 If an employee, upon falling 30 feet to the ground, suffers broken bones or a concussion, that employee would experience substantial impairment of the usefulness of a part of the body and would require treatment by a medical doctor. This injury would constitute serious physical harm.

2 If an employee, tripping on debris, suffers a bruise or abrasion, that employee would not experience substantial reduction of the usefulness of a part of the body nor would that employee require treatment by a medical doctor. This injury would not be serious. However, if the employee would most likely suffer a deep cut of the hand, the use of the hand would be substantially reduced and would require suturing by a medical doctor. This injury would then be serious.

3 If an employee, following exposure to beryllium at .004 mg/m^3, develops berylliosis or cancer, life would be shortened and breathing capacity would be significantly reduced. The illness would constitute serious physical harm.

4 If an employee is exposed regularly and continually to acetic acid at 20 ppm, the irritation that would result from this exposure would not normally be considered to constitute serious physical harm.

(4) Step 4. Whether the employer knew or, with the exercise of reasonable diligence, could and should have known of the presence of the hazardous condition.

(a) The knowledge requirement is met if it is determined that the employer actually knew of the hazardous condition which constituted the apparent violation.

(b) In many cases the compliance officer will not be able to determine employer knowledge. In these cases, the reasonable diligence test must be applied; i.e., could the employer, through the exercise of reasonable diligence, have known of the hazard, assuming that the employer is safety conscious and possesses the technical expertise normally expected of an employer engaged in that particular activity (business).

2. General Violations. This type of violation shall be cited in situations where an accident or illness results from a hazardous condition that would probably not cause death or serious physical harm but would have a direct and immediate relationship to the safety and health of employees.

3. Wilful Violations. The following definitions and procedures apply whenever the compliance officer suspects that a wilful violation may exist:

a. A wilful violation exists under the Law where the evidence shows either an intentional violation of the Law or plain indifference to its requirements.

(1) The employer committed an intention and knowing violation if:

(a) An employer representative was aware of the requirements of the Law or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements.

(b) An employer representative was not aware of the requirements of the Law or standards, but was aware of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

(2) The employer committed a violation with plain indifference to the law where:

(a) Higher management officials were aware of a DOSH requirement applicable to the company's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

(b) Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations.

EXAMPLE: Repeated issuance of citations addressing the same or similar conditions

(c) An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, media coverage, or, in some cases, complaints of employees or their representatives.

(d) Finally, in particularly flagrant situations, wilfulness can be found despite lack of knowledge of either a legal requirement or the existence of a hazard if the circumstances show that the employer would have placed no importance on such knowledge even if they had had it.

b. It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed "wilful". It is sufficient that the violation was deliberate, voluntary, or intentional as distinguished from inadvertent, accidental, or ordinarily negligent.

c. The compliance officer shall carefully develop and record on the OSHA-1B/1B(IH) all evidence available that indicates employer awareness of the disregard for statutory obligations or of the hazardous conditions. Wilfulness could exist if an employer is advised by employees or employee representatives regarding an alleged hazardous condition and the employer does not make a reasonable effort to verify and correct the condition. Additional factors which can influence a decision as to whether or not violations are wilful, include:

(1) The nature of the employer's business and the knowledge regarding safety and health matters which could reasonably be expected in the industry;

(2) The precautions taken by the employer to limit the hazardous conditions;

(3) The employer's awareness of the Law and of the responsibility to provide safe and healthful working conditions;

(4) Whether similar violations or hazardous conditions have been brought to the attention of the employer; and

(5) If the nature and extent of the violations disclose a purposeful disregard of the employer's responsibility under the Law.

d. The determination of whether or not to issue a citation for a wilful or repeated violation will frequently raise difficult issues of law and policy and will require the evaluation of complex factual situations. Accordingly,

a citation for a wilful violation shall not be issued without consultation with the administrator, who shall, as appropriate, discuss the matter with the attorney general.

4. Criminal/WiIful Violations. Section 396-10(g) of the Law provides that "Any employer who wilfully or repeatedly violates any standard, rule, regulation, citation or order issued under authority of this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or both, except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than $20,000 or by imprisonment for not more than one year, or by both."

a. The branch manager, in coordination with the administrator and attorney general, shall carefully evaluate all cases involving workers' deaths to determine whether they involve criminal violation of §396-10(g) of the Law.

b. In cases where an employee's death has occurred which may have been caused by a wilful violation of a Hawaii OSH standard, the supervisor shall be consulted prior to the completion of the investigation to determine if evidence exists and if further evidence is necessary to establish the elements of a criminal/wilful violation. The branch manager shall consult with the administrator and, if appropriate, with the attorney general after the initial determination has been made concerning possible willful violation.

c. The following criteria shall be considered in investigating possible criminal/wilful violations.

(1) Establishment of Criminal/Wilful. DOSH must prove the following in order to establish a criminal/willful violation.

(a) The employer violated a Hawaii OSH standard. A criminal/wilful violation cannot be based on violation of the general duty sections.

(b) The violation was wilful in nature.

1 The employer had knowledge of the hazardous working conditions. Knowledge could be demonstrated through such evidence as the supervisor having been in the vicinity of an unshored, unsloped trench in which employees are working.

2 The employer had knowledge of the requirements of the applicable standard.

a Proving knowledge of the requirements of the applicable standard may present greater

difficulties. Evidence of knowledge of the applicable standard gained through a prior citation, discussions with DOSH or other safety personnel of the requirements of the standard, or other similar evidence would be sufficient to support this element of knowledge.

b. In addition, it may be possible to establish wilfulness, even in the absence of specific knowledge of the Hawaii OSH standard, where the requirements of the standard are known to the employer. When it can be shown that it was recognized by the employer that certain precautions must be taken in order to make a trench safe, either through the employer's past practice of shoring or sloping, through employee complaints, or otherwise, knowledge of the standard's requirement will have been shown.

c. Finally, in particularly flagrant situations, wilfulness can be proved where employees are exposed to a working condition which a reasonably prudent employer should have recognized as being hazardous and requiring corrective action. Even in the absence of evidence that an employer knew that specific precautions should have been taken, if the working conditions are so obviously hazardous and the accepted industry practice is to take certain precautions, an employer's conduct could constitute a wilful violation.

NOTE: It must be emphasized that, particularly with regard to this situation, a key element of wilfulness is flagrancy of the conduct and the employer's plain indifference to employee safety.

(c) The violation of the standard caused the death of an employee. In order to prove that the violation of the standard caused the death of an employee, there must be evidence in the file, which clearly demonstrates that the violation of the standard was the cause of or a contributing factor to an employee's death.

(2) Supervisory Responsibilities. Although it is generally not necessary to issue "Miranda" warnings to an employer when a criminal/wilful investigation is in progress, the administrator should seek the advice of the attorney general on this question.

(a) If the branch manager determines that expert assistance is needed to prove the causal connection between an apparent violation of the standard and the death of an employee, this assistance shall be obtained in accordance with instructions in Chapter III, B.5.

(b) Following the investigation, if the branch manager decides to recommend criminal prosecution, a memorandum containing that recommendation shall be forwarded promptly to the administrator. It shall include an evaluation of the possible criminal charges, taking into consideration the greater burden of proof which requires that the State's case be proven beyond a reasonable doubt. In addition, if the correction of the hazardous condition appears to be an issue, this shall be noted in the transmittal memorandum because in most cases the prosecution of a criminal/wilful case delays the affirmance of the civil citation and its correction requirements.

(c) The branch manager shall normally issue a civil citation in accordance with current procedures even if the citation involves allegations under consideration for criminal prosecution. The administrator shall be notified of such cases, and they shall be forwarded to the attorney general as soon as practicable.

5. Repeated Violations. Violation of any standard, rule, or the general duty section may be cited as repeated under the Law where, upon reinspection, another violation of the previously cited standard, rule, or general duty section is found.

a. Records Review. For purposes of considering whether or not a violation is repeated, review the employer's history of inspection for the past 36 months (calendar date to calendar date) only. If a repeated violation has become a final order as a "repeat" within the past 36 months and the condition is found again, consideration should be given to classifying it as "wilful"; otherwise, the violation may be classified as a second repeated violation. The review of citations issued to employers having fixed establishments, (e.g., factories, stores, terminals) will be limited to the cited establishment. For employers engaged in businesses having no fixed establishments (e.g., construction, painting, excavation) repeated violations shall be alleged based on prior violations occurring anywhere within the State.

b. Violation in Contest. Where a violation of a previously cited condition is apparent and that first violation has been contested and has not yet become a final order of the appeals board, the second violation shall still

be documented by the compliance officer. The branch manager shall review the current status of the contested items, and may issue a citation after consultation with the administrator and deputy attorney general as other than a repeated violation, e.g. initial violation or wilful.

c. Geographical Limitations. For purposes of determining if a violation is repeated, the following criteria shall apply.

(1) High Gravity Serious Violations. When high gravity serious violations are to be cited, the branch manager shall obtain a history of citations previously issued to this employer at all of the employer's identified establishments. If this violation had been previously cited within the time limitations described in B.5.d. and is a final order, a repeated citation shall be issued. Under special circumstances, the administrator, in consultation with the deputy attorney general, may also issue citations for repeated violations without regard for the SIC code.

EXAMPLE: Following an inspection, a high gravity serious violation of §12-80-2(a)(3) and a moderate gravity serious violation of §12-80-2(a)(5) are to be alleged against Employer A. A query of the IMIS for Employer A's Federal enforcement history (within the same two-digit SIC) shows a previous serious citation for violation of §12-80-2(a)(3) and §12-80-2(a)(5) at an establishment of Employer A in another Federal enforcement State. For the current citation, therefore, the violation of §12-80-2(a)(3) may be cited as repeated; the violation of §12-80-2(a)(5) may not.

(2) Violations of Lesser Gravity. To determine whether a violation of lesser gravity than high gravity serious may be classified as repeated, the following criteria regarding geographical limitations shall apply:

(a) Fixed Establishment. An establishment is interpreted to mean "a single physical location where business is conducted or where services or industrial operations are performed," as defined in §12-50-2. For purposes of considering whether a violation is repeated, citations issued to employers having fixed establishments (e.g., factories, terminals, stores) shall be limited to the cited establishment.

EXAMPLE: A multi-establishment employer would not be cited for a repeated violation if the same violation recurred at a plant or business location other than the one previously cited.

(b) Nonfixed Establishment. A nonfixed establishment (e.g., construction sites, geothermal drilling sites) is interpreted to mean all geographical sites or locations within DOSH jurisdiction where construction, drilling, or other movable operation is being performed by the employer. For employers

engaged in businesses having no fixed establishments, repeated violations will be alleged based on prior violations occurring anywhere within the State.

EXAMPLE: Where the construction site extends over a large area or the scope of the job is unclear (such as road construction), that portion of the workplace specified in the employer's contract which falls within DOSH jurisdiction is the establishment.

d. Time Limitations. Although there are no statutory limitations upon the length of time that a citation may serve as the basis for a repeated violation, in order to ensure uniformity, 3 years from the date that the original citation became a final order or within 3 years of the final correction date, whichever is later, is the maximum time period that may serve as the basis for a repeated violation.

e. Repeated vs. Willful. Repeated violations differ from willful violations in that they may result from an inadvertent, accidental, or ordinarily negligent act. A willful violation need not be one for which the employer has been previously cited. Where a repeated violation also meets the criteria for willful, a citation for willful violation will be issued.

f. Repeated vs. Failure to Abate. A failure-to-abate situation exists when an item of equipment or condition previously cited has never been corrected and is noted at a later inspection. If, however, the violation was not continuous (i.e., if it had been corrected and reoccurred), the subsequent reoccurrence is a repeated violation.

g. Supervisor Responsibilities. The supervisor (or branch manager) shall perform the following functions after the compliance officer makes the initial recommendation that the violation be cited as "repeated."

(1) Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section.

(2) Ensure that the case file includes a copy of the prior violation citation which serves as the basis for the repeated citation.

(3) In unique or unusual circumstances (e.g., when a previously cited employer has been bought out by a successor employer), take further steps, as necessary, to ensure that the violation meets the intent of the criteria outlined in this FOM before being cited as a repeated violation. In these circumstances, the branch manager shall consult the administrator.

(4) If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for repeated citation, either by telephone or by notation in the AVD portion of the citation, using the following or similar language:

THE (COMPANY NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OR THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN DOSH INSPECTION NUMBER _____, CITATION NUMBER _____, ITEM NUMBER_____ ,ISSUED ON (DATE).

C. Health Standard Violations.

1. General. The classification of health violations may require evaluation of complex work processes as well as physical plants and PEL. All relevant factors must be carefully considered when making classification decisions.

2. Citation of Ventilation Standards. In cases where a citation of a ventilation standard may be appropriate, consideration shall be given to standards intended to control exposure to recognized hazardous levels of air contaminants, to prevent fire or explosions, or to regulate operations which may involve confined space or specific hazardous conditions. In applying these standards, the following guidelines shall be observed.

a. Health-Related Ventilation Standards. An employer is considered in compliance with a health-related airflow ventilation standard when the employee exposure does not exceed appropriate airborne contaminant standards; e.g., the PELs prescribed in chapter 202 of the standards.

(1) Where an over-exposure to an airborne contaminant is detected, the appropriate air contaminant engineering control requirement will be cited; e.g., §12-202-12. In no case shall citations of this standard be issued for the purpose of requiring specific volumes of air to ventilate such exposures.

(2) Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

b. Fire and Explosion-Related Ventilation Standards. Although they are not technically health violations, the following guidelines shall be observed when citing fire-related and explosion-related ventilation standards.

(1) Adequate Ventilation. In the application of fire-related and explosion-related ventilation standards, DOSH considers that an operation has adequate ventilation when both of the following criteria are met.

(a) The requirement of the specific standard has been met.

(b) The concentration of flammable vapors is 25 per cent or less of the lower explosive limit (LEL).

EXCEPTION: Certain standards specify violations when 10 per cent of the LEL is exceeded. These standards are found in construction exposures.

(2) Citation Policy.

(a) If 25 per cent (10 per cent when specified for construction operations) of the LEL has been exceeded and the standard requirements have not been met, the standard violation shall be cited as serious, otherwise, as general.

(b) If 25 per cent (10 per cent when specified for construction operations) of the LEL has been exceeded and there is no applicable specific ventilation standard, §12-51-1 shall be cited in accordance with the guidelines given in A.2. of this chapter.

c. Special Conditions Ventilation Standards. The primary hazards in this category are those resulting from confined space operations and welding.

(1) Overexposure need not be shown to cite ventilation requirements found in the standards themselves.

(2) Other hazards associated with confined space operations, such as oxygen deficiency, must be adequately documented before a citation may be issued.

3. Violations of the Noise Standard. A citation for a violation of §12-200-9(b) shall be issued when an employee's exposure exceeds the limits specified in table 200-1, whether or not the employee was wearing hearing protection, if feasible engineering or administrative controls were not utilized.

a. When hearing protection is required but not used and employee exposure exceeds the limits of table 200-1, §12-200-19(b)(1) shall be cited and classified as serious (See C.3.d.) whether or not the employer has instituted a hearing conservation program. Section 12-200-9(a) shall no longer be cited.

b. If an employer has instituted a hearing conservation program and a violation of chapter 200 of the standards (other than §12-200-19(b)(1)) is found, a citation shall be issued if employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dBA. Such a citation shall be classified as general.

c. If the employer has not instituted a hearing conservation program and employee noise exposures equal or exceed an 8-hour time-weighted average of 85 dBA, a citation for §12-200-10(a) only shall be issued and classified as general.

d. Violations of §12-200-19(b)(1) shall be grouped with violations of §12-200-9(b) and classified as serious when an employee is exposed to noise levels above the limits of table 200-1 and:

(1) Hearing protection is not utilized or is not adequate to prevent overexposure to an employee; or

(2) There is evidence of hearing loss which could reasonably be considered:

(a) To be work-related, and

(b) To have been preventable, at least to some degree, if the employer had been in compliance with the cited provisions.

e. Any violation of chapter 200 of the standards not meeting the conditions given in d. above shall be classified as general.

f. A citation shall not be issued when:

(1) An employee is overexposed but effective hearing protection is being provided and used;

(2) An effective hearing conservation program has been implemented; and

(3) No feasible engineering or administrative controls exist.

4. Violations of the Respirator Standard. When considering a citation for respirator violations, the following guidelines shall be observed.

a. In Situations Where Overexposure Does Not Occur.

(1) Where an overexposure has not been established but an improper type of respirator is being used (e.g., a dust respirator being used to reduce exposure to organic vapors), a citation under §12-64-6(c) shall be issued as general, provided the documents indicate that an overexposure is possible.

(2) Where an overexposure has not been established and one or more of the other requirements of §12-64-6 is not being met (e.g., an unapproved respirator is being used to reduce exposure to toxic dusts), a general violation shall not be recorded. (Note that this policy does not include emergency use respirators.) The

compliance officer shall advise the employer of the elements of a good respirator program as required under §12-64-6.

(3) In exceptional circumstances a serious or general citation may be warranted if an adverse health condition due to the respirator itself could be supported and documented. Examples may include a dirty respirator that is causing dermatitis, a significant ingestion hazard created by an improperly cleaned respirator, or where the employer requires the use of a respirator without determining if the worker is medically able to do the work and wear the respirator, does not provide training on the use and limitations of the respirator, and a health hazard or illness has been documented.

b. In Situations Where Overexposure Does Occur. In cases where an overexposure to an air contaminant has been established, the following principles apply to citations of §12-64-6.

(1) Section 12-64-6(a)(2) is the general section requiring employers to provide respirators "...when the equipment is necessary to protect the health of the employee" and requiring the establishment and maintenance of a respiratory protection program which meets the requirements outlined in §12-64-6(b). Thus, if no respiratory program at all has been established, §12-64-6(a)(2) alone shall be cited; if a program has been established and some, but not all, of the requirements under §12-64-6(b) are met, the specific standards under §12-64-6(b) that are applicable shall be cited. In both cases the citations shall be grouped as one item together with the violation of the PEL for the air contaminant involved.

(2) An acceptable respiratory protection program includes all of the elements of §12-64-6; however, the standard is structured such that essentially the same requirement is often specified in more than one section. In these cases, the section which most adequately describes the violation shall be cited.

5. Violations of Toxic Materials and Harmful Physical Agents (Chapter 12-202). The standard itself provides several requirements.

a. Sections 12-202-4 through 11 provide ceiling values and 8-hour time-weighted averages (permissible exposure limits) applicable to employee exposure to air contaminants.

b. Section 12-202-12 provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When those controls do not achieve full compliance, protective equipment shall be used. Whenever respirators are used, their use shall comply with §12-64-6.

c. Section 12-64-6(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used. Their use shall comply with requirements contained in §12-64-6, which provide for the type of respirator and the proper maintenance.

d. The situation may exist where an employer must provide feasible engineering controls as well as feasible administrative controls (including work practice controls) and personal protective equipment. Section 12-202-12 has been interpreted to allow employers to implement feasible engineering controls or administrative and work practice controls in any combination the employer chooses provided the abatement means chosen eliminates the overexposure.

e. Where engineering or administrative controls are feasible but do not or would not reduce the air contaminant levels below the applicable ceiling value or permissible exposure limits, the employer, nevertheless, must institute these controls. Only where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels will the use of personal protective equipment constitute satisfactory equipment. In these cases, usage of personal protective equipment shall be mandatory.

6. Classification of Violations of Toxic Materials and Harmful Physical Agents Standards. When it has been established that an employee is exposed to a toxic substance in excess of the PEL established by Hawaii OSH standards (without regard to the use of respirator protection), a citation for exceeding the hazardous substance standard shall be issued.

a. Classification of Violations. Classification of violations is dependent upon the determination that the illness is reasonably predictable at that exposure level, whether the illness is serious or general and that the employer knew or could have known through reasonable diligence that a hazardous condition existed.

b. Principles of Classification. Exposure to a substance shall be considered serious if the exposure could cause impairment to the body as described in B.1.b.(3)(b)4.

(1) In general, substances having a single health code of 13 or less shall be considered as serious at any level above the PEL. Substances in categories 6, 8, and 12, however, are not considered serious at levels where only mild. temporary effects would be expected to occur.

(2) Substances causing irritation (i.e., categories 14, 15 and 16) shall be considered general up to levels at which "moderate" irritation could be expected.

(3) For a substance (e.g., cyclohexanol), having multiple health codes covering both serious and general effects, a classification of general shall be applied up to the level at which a serious effect could be expected to occur.

(4) For a substance having NIOSH recommended value or an ACGIH Threshold Limit Value (TLV), a citation for exposure in excess of

the recommended value shall be considered under §12-51-1 in accordance with the guidelines given in A.2, if exposure above that limit is recognized as hazardous by the employer or the industry.

(5) If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., NIOSH or ACGIH TLV recommended value), a citation for inhalation cannot be issued. The compliance officer shall advise the employer that a reduction of the PEL has been recommended.

(6) For a substance having an 8-hour PEL with no ceiling PEL but which a NIOSH ceiling value has been recommended, the case shall be referred to the administrator. If no citation is to be issued, the compliance officer shall, nevertheless, advise the employer that a ceiling value has been recommended.

c. Specific Guidance. For any substance falling within a health code classified as serious, a serious citation shall be issued for excessive exposure, for failure to utilize feasible engineering or administrative controls, and for failure to use respirators or to have an adequate respirator program (items grouped). If however, the employer is exhibiting good faith by having an adequate respirator program in use which is effective in reducing actual employee exposure to below the applicable standard (i.e., all the significant elements of a respiratory program required in §12-64-6 are being met), a general citation shall be issued for excessive exposure and failure to utilize feasible engineering or administrative controls.

d. Effect of Respirator Protection Factors. The compliance officer shall consider protection factors for the type of respirator in use as well as the possibility of overexposure if the respirator fails. If protection factors are exceeded and if the potential for overexposure exists if respirator failure occurs (e.g., environment at or near short-term limits), a citation for failure to control excessive exposure shall be issued.

e. Additive and Synergistic Effects. Substances, which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination shall be evaluated using the formula found in §12-202-11.

(1) The use of this effect requires that the exposures have an additive effect on the same body organ or system. Caution must be used in applying the additive formula, and prior consultation with the administrator is required.

(2) If the compliance officer suspects that synergistic effects are possible, it shall be brought to the attention of the supervisor, who shall refer the question to the branch manager. If it is decided that there is a synergistic effect of the substances found together, the

violations shall be grouped, when appropriate, for purposes of increasing the violation classification severity or the penalty.

7. Guidelines for Issuing Citations of Toxic Materials and Harmful Physical Agents Violations. No violation of chapter 202 of the standards would exist and no citation would be issued in the following circumstances.

   a. No identified employee exposure level is above that specified in the standard, whether or not engineering controls, administrative controls, or personal protective equipment are utilized.

   b. The exposure level of an identified employee is above that specified in the standard, but all feasible engineering and administrative controls are utilized and personal protective equipment is provided, worn, and maintained in accordance with the provisions of §12-64-6.

8. Violations of the Hazard Communication Standard. Violations of the hazard communication standard shall be classified as serious whenever such a violation causes or contributes to a potential exposure capable of producing serious physical harm or death.

   a. Such violations shall be combined or grouped in accordance with the guidelines given in Chapter V, C. Because of the difficulty of using the penalty calculation factors outlined in Chapter VI for shipped containers (as opposed to inplant hazards), the following special penalty guidelines for shipped containers shall apply:

      (1) If no hazard determination has been conducted, probability/severity factor of 5 shall be applied.

      (2) If there is no material safety data sheet (MSDS) available or no label for a hazardous chemical (classified as serious), a probability/severity factor of 10 shall be applied.

      (3) If the label has an inadequate hazard warning or none at all, a probability/severity factor of 5 or 10 shall be applied, depending on the significance of the missing element.

      (4) If the MSDS does not contain sufficient hazard information, a probability/severity factor of 5 or 10 shall be applied, depending on the significance of the missing elements.

   b. Violations of §12-203-9(b) (when the employer refuses to provide specific chemical identity information in a medical emergency) shall be classified as wilful with a probability/severity factor of 5 to 10, depending on the circumstances involved in the particular case. In such cases, the additional factor described in Chapter V, B.3. shall be considered.

9. Citing Improper Personal Hygiene Practices. The following guidelines apply when citing personal hygiene violations.

a. Ingestion Hazards. A citation under §12-67-7(a) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a toxic material may be ingested and subsequently absorbed.

(1) For citations under §12-67-7(a) wipe sampling results shall be adequately documented to establish a serious hazard.

(2) Where, for any substance, a serious hazard is determined to exist due to the potential of ingestion or absorption of the substance for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under §12-51-1.

(3) These citations do not depend on measurements of airborne concentrations.

b. Absorption Hazards. A citation for exposure to materials which can be absorbed through the skin or which can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective equipment (clothing) is necessary but not worn. The citation shall be issued under §12-64-2(a) as either a serious or general citation, according to the hazard.

(1) These citations do not depend on measurements of airborne concentrations.

(2) If a serious skin absorption or dermatitis hazard exists which cannot be eliminated with protective clothing, a general duty section citation may be considered. Engineering or administrative (including work practice) controls shall be required in these cases to prevent the hazard.

c. Wipe Sampling. In general, wipe sampling (not air sampling) will be necessary to establish the presence of a toxic material posing a potential absorption or ingestion hazard. (See Technical Manual for sampling procedures.)

(1) Issue Citation. There are two primary considerations when issuing a citation of an ingestion or absorption hazard, such as a citation for lack of protective clothing.

(a) A health risk exists as demonstrated by one of these:

1 A potential for an illness, such as dermatitis; or

2 The presence of a toxic material that can be ingested or absorbed through the skin or in some other manner. (See table 202-1, and 202-2.)

(b) The potential that the toxic material can be ingested or absorbed, e.g., that it can be present on the skin of the employee, can be established by evaluating the conditions of use and determining the possibility that a health hazard exists.

(c) The conditions of use can be documented by taking both qualitative and quantitative results of wipe sampling into consideration when evaluating the hazard.

(2) Support Citation. There are three primary considerations which must be met and documented to support a citation for improper personal hygiene.

(a) The potential for ingestion or absorption of the toxic material must exist.

(b) The ingestion or absorption of the material must represent a health hazard.

(c) The toxic substance must be of such a nature and exist in such quantities as to pose a serious hazard. The substance must be present on surfaces, which have hand contact (such as lunch tables, cigarettes, etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption of the toxic material (e.g., a water fountain).

d. Biological Monitoring. If the employer has been conducting a biological monitoring, the compliance officer shall evaluate the results of the testing. The results may assist in determining whether or not a significant quantity of the toxic material is being ingested or absorbed through the skin.

e. Determination of Source. Prior to the issuance of a citation, the compliance officer shall carefully investigate the source or cause of the observed hazards to determine if some type of engineering, administrative or work practice control, or combination thereof, may be applied which would reduce employee exposure.