

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 98-036 (WH)
DIRECTOR, DEPARTMENT OF LABOR)	(OSHCO No. C4756)
AND INDUSTRIAL RELATIONS,)	(Report No. 120653522)
Complainant,)	
)	
vs.)	
)	
MARYL GROUP, INC.)	
Respondent.)	
)	

FILED
LIR APPEALS BOARD
STATE OF HAWAII

01 OCT 11 P2:59

DECISION AND ORDER

This Occupational Safety and Health case came before the Hawaii Labor Relations Board (HLRB), acting as hearing officer for the Labor and Industrial Relations Appeals Board (Board), on a written notice of contest filed by Respondent, MARYL GROUP, INC. (Respondent or MARYL), from a Citation and Notification of Penalty issued on September 11, 1998, by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), State of Hawaii, via the Division of Occupational Safety and Health, (HIOSH) (collectively Complainant).

The Director had found violations of ten (10) HIOSH standards, for which characterizations were made, dates of abatement were identified, and penalties were imposed. The issues to be determined were:

Citation 1

- (1) Whether Respondent violated standard 29 Code of Federal Regulations (CFR) § 1926.501(b)(1), as described in Citation 1, Item 1a?

- i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
 - ii) If so, was the imposition and amount of the proposed \$1,375.00 penalty appropriate?
- (2) Whether Respondent violated standard 29 CFR § 1926.501(b)(1) as described in Citation 1, Item 1b?
 - i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- (3) Whether Respondent violated standard 29 CFR § 1926.501(b)(2)(i) as described in Citation 1, Item 2a?
 - i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
 - ii) If so, was the imposition and amount of the proposed \$1,375.00 penalty appropriate?
- (4) Whether Respondent violated standard 29 CFR § 1926.501(b)(2)(i) as described in Citation 1, Item 2b?
 - i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

- (5) Whether Respondent violated standard 29 CFR § 1926.501(b)(13) as described in Citation 1, Item 2c?
- i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- (6) Whether Respondent violated standard 29 CFR § 1926.501(c) as described in Citation 1, Item 3?
- i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- ii) If so, was the imposition and amount of the proposed \$825.00 penalty appropriate?
- (7) Whether Respondent violated standard 29 CFR § 1926.451(g)(1) as described in Citation 1, Item 4?
- i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- ii) If so, was the imposition and amount of the proposed \$3,500.00 penalty appropriate?
- (8) Whether Respondent violated standard 29 CFR § 1926.451(g)(4)(iii) as described in Citation 1, Item 5.

- i) If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?
- ii) If so, was the imposition and amount of the proposed \$1,375.00 penalty appropriate?

Citation 2

- (9) Whether Respondent violated standard 29 CFR § 1926.502(k)(5) as described in Citation 2, Item 1?
 - i) If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization?
- (10) Whether Respondent violated standard 29 CFR § 1926.502(k)(7) as described in Citation 2, Item 2?
 - i) If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization?
- (11) Whether Respondent violated standard 29 CFR § 1926.502(k)(9) as described in Citation 2, Item 3?
 - i) If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization?

(12) Whether Respondent violated standard 29 CFR § 1926.451(b)(1) as described in Citation 2, Item 4?

i) If so, is the characterization of the violation as "other" appropriate? If not, what is the appropriate characterization?

HLRB heard this case, and on September 18, 2001, issued its Proposed Findings of Fact, Conclusions of Law, and Order (Proposed Decision and Order). The parties were afforded ten days from receipt of the Proposed Decision and Order to file exceptions.

On September 28, 2001, Complainant filed exceptions to HLRB's Proposed Decision and Order, with the Board. Respondent did not file any exceptions.

Having reviewed the record and the exceptions filed by Complainant, we hereby issue this Decision and Order modifying HLRB's Proposed Decision and Order in two aspects. Proposed Conclusion of Law, number 7.E, is modified, so that our acceptances and rejections of Complainant's and Respondent's proposed conclusions of law which we refer to, comport with our ultimate conclusion and order, namely that Respondent violated HIOSH standard, Section 29 CFR 1926.501(b)(2)(i), as described in Citation 1, Item 2b, which is affirmed. Proposed Conclusion of Law, number 10.A, is modified, so that our specified acceptances and rejections of Complainant's and Respondent's proposed conclusions of law which we refer to, comport with our ultimate conclusion and order, namely that Respondent did not violate HIOSH

standard, Section 29 CFR 1926.501(b)(2)(i), as described in Citation 1, Item 2a, which is vacated.

FINDINGS OF FACT

1. Respondent was, for all times relevant, the general contractor engaged in the construction of two-story residential structures located at 72-120 Waiulu Street, Kailua-Kona, known as Hualalai/Four Seasons (Construction Site).
2. HIOSH received a complaint with seven photographs (Complaint Photos) dated May 15, 1998, alleging fall protection violations against Respondent at the Construction Site mailed in by an anonymous entity.
3. HIOSH responded to the complaint by assigning Safety Compliance Officer, Charles Clark (Clark), to conduct a complaint inspection at the Construction Site on June 9, 1998.
4. Based on Clark's inspection of June 9, 1998 and July 15, 1998 (Inspection No. 120653522), HIOSH issued a Citation and Notification of Penalty (Citation) to MARYL on September 11, 1998.
5. After the parties held a telephonic informal conference on October 1, 1998, MARYL timely contested the two citations on October 5, 1998.
6. Citation 1, Items 1 to 5, relating to noncompliance with fall protection standards, at the Palm Villas Buildings 7 and 8, and the Fairway Villas Building 9, were

determined to be "serious" and resulted in fines totaling \$8,400.00.

7. Citation 2, Items 1 to 4, relating to noncompliance of Respondent's fall protection plan at the Construction Site and Palm Villas Building and Fairway Villas Buildings 9 and 10, were determined to be "other." No penalty fines were assessed.

Inspection

8. On June 9, 1998, while driving on an access road off of a public highway leading to the Construction Site office to do the opening conference, Clark photographed Respondent's employees working on the second floor without conventional fall protection systems such as guardrails, safety net, or personal fall arrest systems at the Palm Villas Buildings 7 and 8, and Fairway Villas Building 9.
9. Upon arriving at approximately 9:00 a.m., on June 9, 1998, at the Construction Site office, Clark presented his credentials. Clark discussed the Complaint Photos with the Site Superintendent.
10. Before proceeding with his inspection, Clark was asked to wait two hours in order to allow Respondent's designated "competent person," Christopher Norris (Norris), to be present to accompany him on the inspection. Norris was in Hilo at the time conducting a safety seminar. Norris

began his drive back to Kona as soon as he was called about Clark's inspection.

11. Respondent permitted Clark to remain at the Construction Site while he waited for a decision from his supervisor in Honolulu who was speaking directly with Norris by telephone.
12. While waiting at the Construction Site, Clark photographed construction activities occurring in plain view on the second floor landing of several buildings.
13. While waiting to hear from his supervisor, Clark spoke to Respondent's management personnel about the Complaint Photos, but was unable to verify that violations existed because the construction in the Complaint Photos had changed.
14. Clark was directed by his supervisor not to wait more than an hour for Respondent's designated "competent person" to arrive from Hilo in adherence with the prohibition against advance notice and HIOSH's internal guidelines permitting inspectors to delay an inspection for one hour only.
15. Clark ended his inspection after remaining at the Construction Site for not more than one hour, and treated Respondent's request to wait as a refusal of right of entry or inspection. He returned to his office where he proceeded to apply for a search warrant for inspection under Hawaii Revised Statutes (HRS) § 396-4(d)(1).

16. After applying for and obtaining a search warrant for inspection issued July 7, 1998 by the Circuit Court of the Third Circuit, Clark returned to the Construction Site on July 15, 1998, and conducted a full inspection accompanied by Norris.
17. During the inspection on July 15, 1998, Clark reviewed and discussed with Norris both the Complaint Photos and the photos Clark had taken while at the Construction Site on June 9, 1998.
18. We accept Complainant's Proposed Findings of Fact, Nos. 1 through 12 and Respondent's Proposed Findings of Fact, Nos. 1 through 19. The accepted findings of fact are incorporated by reference in the above Proposed Findings, Nos. 1 through 18.

Applicable Standard

19. HIOSH has continued to enforce the promulgated rules as contained in 29 CFR § 1926.500, Sub-part M. By memorandum dated March 5, 1996, HIOSH Administrator, Jennifer Shishido, notified the Federal Occupational Safety and Health Administration (OSHA) that Hawaii will continue to enforce the existing Subpart M as duly promulgated and not adopt OSHA Instruction Standards Directive (STD) 3.1. Because Hawaii did not adopt STD 3.1, we do not credit the opinion of Respondent's expert witness Walter Chun that under STD 3.1, Respondent was not required to have a fall protection plan in

conformance with § 1926.502(k). Therefore, we reject Respondent's Proposed Findings of Fact, Nos. 20 through 22, a through o.

20. Citation 1, Items 1a and 1b

a. Respondent was cited for having an "unprotected side and edge" hazard in violation of 29 CFR § 1926.501(b)(1), which provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrails systems, safety net systems, or personal fall arrest system.

b. Citation 1, Item 1a states that "three employees were photographed standing on a plyboard floor deck without any type of fall protection." This citation is based on a Complaint Photo that is unreliable and speculative. As such, on June 9, 1998, Clark could not verify that Respondent's employees were exposed to a hazard based on the Complaint Photo .

c. On inspection, Clark did not observe three of Respondent's employees exposed to an unprotected side or edge of a walking/working surface six or more feet above a lower level. Thus, there is no

reliable basis for applying the fall protection standard.

- d. Regarding Citation 1, Item 1a, we accept Respondent's Proposed Findings of Fact Nos. 1, 2, 5, and 6, and reject Respondent's Proposed Findings of Fact, Nos. 3, 4, 7, and 8. We also reject Complainant's Proposed Findings of Fact, Nos. 1 through 10. The accepted findings are incorporated by reference herein.
- e. Citation 1, Item 1b states that, "an employee working in the area walked towards the unprotected side without any type of fall protection." This citation was based on Clark's inspection properly conducted on July 15, 1998, and recorded on the inspection worksheet form when he saw Respondent's employees working on the second floor of the Palm Villas Building 8. The ground below was cluttered with lumber and equipment and measured at least 11 feet from the second floor. Clark saw Respondent's employee walk within two feet from an open-sided edge of the platform. The employee was in the process of installing a guardrail, but admitted to Clark he was not given any fall protection equipment. The worker was exposed to a falling hazard without any protection in plain view of Norris. We credit Clark's testimony.

f. Regarding Citation 1, Item 1b, we accept Complainant's Proposed Findings of Fact, Nos. 1 through 11, and 12, in part. We accept Respondent's Proposed Findings of Fact, Nos. 1, 3, and 4, and reject Respondent's Proposed Findings of Fact, Nos. 2 and 5 through 12. The accepted findings of fact are incorporated by reference herein.

19. Citation 1, Items 2a, 2b, and 2c

a. In Citation 1, Items 2a and 2b, Respondent was cited for violating 29 CFR § 1926.501(b)(2)(i),¹ for a "leading edge" hazard as follows:

¹29 CFR § 1926.501(b)(2), states that "the employer shall develop and implement a fall protection plan that meets the requirements of paragraph (k) of §1926.502."

Paragraph (k) of 29 CFR § 1926.502 provides as follows:

1. *The plan shall be prepared by a qualified person specifically for the site where there is leading edge work.*
2. *A qualified person approve any changes to the plan.*
3. *A copy of the plan is maintained at the job site.*
4. *The plan is implemented under the supervision of a competent person.*
5. *The plan shall document why conventional fall protection systems (CFPS) are infeasible or create a greater hazard.*
6. *Include a written discussion of other measures taken to reduce or eliminate fall hazards.*
7. *Identify each location where CFPS cannot be used. These areas are classified as controlled access zone which must comply with 29 CFR §1926.502(h).*
8. *Where no alternative measures are used, the employer shall use a safety monitoring system in conformance with § 1926.502(h).*
9. *The plan must include a statement identifying the name or other means of identifying each employee authorized to work in the controlled access zone.*
10. *Investigate the circumstances of any fall to determine if the plan needs to be changed and implement such changes.*

Each employee who is constructing a leading edge 6 feet (1.8m) or more above lower levels was not protected from falling by guardrail systems, safety net systems, or personal fall arrest systems.

- b. Citation 1, Item 2a states that "an employee was photographed by the complainant working on a deck 10 feet 6 inches above the ground without any type of fall protection." This citation is based on a Complaint Photo that is unreliable and speculative. As such on June 9, 1998, Clark could not verify that Respondent's employees were exposed to a hazard based on the Complaint Photo.
- c. On inspection, Clark did not observe an employee working on a deck 10 feet 6 inches above the ground at the Construction Site located at Fairway Villas Building 9. Thus, there is no reliable basis for applying the fall protection standard for leading edge hazard.
- d. Regarding Citation 1, Item 2a, we accept Respondent's Proposed Findings of Fact, Nos. 1 and 6 and reject Findings of Fact, Nos. 2 through 5, and 7. We reject Complainant's Proposed Findings of Fact, Nos. 1 through 7, and 9, in part, crediting the Complaint Photo. We accept Complainant's Proposed Findings of Fact, Nos. 8 and 9 in part,

- finding Respondent's fall protection plan did not comply with the requisites of 29 CFR § 1926.502(k).
- e. Citation 1, Item 2b states that "three employees installing floor sheathing were not protected from falling 11 feet to the ground below."
 - f. Citation 1, Item 2b was based on photographs taken by Clark on June 9, 1998, in plain view while driving toward the Construction Site. At the inspection on July 15, 1998, Clark showed the photographs to Norris, who responded that 1) the employees were covered by the fall protection plan; 2) the employees were working in a controlled access zone (CAZ), and 3) conventional fall protection was infeasible or created a greater hazard.
 - g. Clark found the fall to the ground was 11 feet and saw one employee walk two feet from the unprotected side. Clark assessed the Respondent's fall protection plan to be inadequate. He disagreed with Norris regarding infeasibility because:
 - lifelines could easily have been installed. Also there were no control lines erected to limit access to the area and to also identify the area as a control access zone (CAZ). The company's fall protection calls for the CAZ to have

control lines erected not less than six feet or not more than 25 feet from unprotected or leading edges. The fall protection plan on page 4 discusses the installation of control lines. According to Chris Norris the company had yellow warning tape at the base of the building and ladders to limit access to the CAZ. Also the fall protection plan did not explain why conventional fall protection created a greater hazard or was infeasible. The plan also did not identify each location where conventional fall protection was infeasible or created a greater hazard. The fall protection plan provided by the company stated work activities instead of identifying each location for the defense of not utilizing conventional fall protection. The company was using the fall protection plan as a blanket coverage for the entire site. The plan also did not identify the employees who could work in the CAZ. The plan did not identify each worker who is permitted to work in the CAZ and there was no

listing of any employee in the appropriate sections.

- h. We credit Clark's assessment of Respondent's fall protection plan and adopt his findings as reported on the worksheet for Citation 1, Item 2b in finding that Respondent's fall protection plan failed to comply with the requirements of 29 CFR § 1926.502(k) as required by 29 CFR § 1926.501(b)(2)(i).
- i. Regarding Citation 1, Item 2b, we accept Complainant's Proposed Findings of Fact, Nos. 1 through 10, and accept Respondent's Proposed Findings of Fact, Nos. 1 and 2, and reject Proposed Findings of Fact, Nos. 3 through 9.
- j. In Citation 1, Item 2c, Respondent was cited for two fall hazards in violation of 29 CFR § 1926.501(b)(13).²

²29 CFR § 1926.501(b)(13) reads:

Each employee engaged in residential construction activities 6 feet (1.8) or more above lower levels was not protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 29 CFR § 1926.502. Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 29 CFR § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those

- k. Citation 1, Item 2c states: (a) an employee was witnessed standing on floor joints 11 feet above the ground without fall protection; (b) three employees were witnessed standing on a floor 11 feet above the ground without fall protection.
- l. This citation was based on observations by Clark in plain view at the Construction Site, which he photographed before the opening conference of the inspection on June 9, 1998. Clark saw an employee walking on floor joists without any type of fall protection. He watched the employee walk to the end of the joists and begin nailing lumber. The employee was not wearing a safety harness or lanyard. The fall below was estimated to be 11 feet. According to Clark, the Construction Site office could be seen by him, and supervisors began warning the employees to "stop the activity" after Clark presented his credentials. Clark also saw three employees standing on a deck without any type of fall protection. When he pointed out the employees to a site supervisor, he noticed that a few minutes later the employees were using conventional fall protection consisting of safety harness and lanyards.

systems.

- m. At the inspection on July 15, 1998, Clark discussed the two photos with Norris, who took the position that the area was a CAZ. Clark reported that "the concrete deck had already been poured and conventional fall protection could have easily been used." We credit Clark's observations on June 9, 1998, which he photographed, and adopt as findings the information he reported from his inspection on July 15, 1998.
- n. Regarding Citation 1, Item 2c, we accept Complainant's Proposed Findings of Fact, Nos. 1 through 12. We accept Respondent's Proposed Findings of Fact, Nos. 1 and 3, and reject Proposed Findings of Fact Nos. 2, 4, 5, 6, 7, 8, 9, and 10. The accepted findings of fact are incorporated by referenced herein.

20. Citation 1, Item 3

- a. Respondent was cited for not protecting employees from objects that may fall through a floor opening in violation of 29 CFR § 1926.502(c), which provides that "when an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures" to protect employees by erecting toe boards, screen or a guardrail systems,

or a canopy structure or by barricading an area in which objects may fall.

b. Citation 1, Item 3 states that: "scrap lumber and materials were located at the edge of floor and were located at the edge of floor and were not prevented from falling to the area below." This citation is based on Clark's inspection on July 15, 1998, of the Palm Villas Building 8, second floor. He reported seeing an eight-foot section of flooring with scrap pieces of lumber and other materials at the edge of the floor adjacent to the stairway used by employees to gain access to the second floor. Clark saw several employees working on the first floor and two employees on the second floor. Clark reported in his inspection worksheet that "Chris Norris had toe boards installed." We credit Clark's testimony.

c. Regarding Citation 1, Item 3, we accept Complainant's Proposed Findings of Fact, Nos. 1 through 6. We accept Respondent's Proposed Findings of Fact, Nos. 1, 2, 3, 4, 7, 8, and 9, and reject Respondent's Proposed Findings of Fact, Nos. 5, 6, and 10.

21. Citation 1, Item 4

a. Respondent was cited for failing to have fall protection in violation of 29 CFR § 1926.451(g)(1),

which provides in part that: "Each employee on a scaffold more than 10 feet (3.1m) above a lower level was not protected from falling to that lower level."

- b. Citation 1, Item 4 states that, "an employee was witnessed working on a one stage high scaffold that was positioned next to the edge of open sided floor without any type of fall protection." This citation was based on photographs taken by Clark while walking to the office to do an opening conference at the Construction Site on June 9, 1998.
- c. Clark observed and photographed in plain view Respondent's employee working on a "one stage high tubular welded scaffold" next to an open-sided floor that measured 11 feet above the ground. Clark reported that "the employee had no fall protection to prevent him from falling. He also had a long piece of lumber in his hand which could contribute to a loss of balance. The employee was subjected to a 16 foot fall to the ground below." We credit Clark's testimony and worksheet as accurately reporting what he saw and photographed on June 9, 1998.
- d. At the inspection on July 15, 1998, Clark discussed the photos taken at the June 9, 1998 inspection

with Norris, who stated that the employee "could have been erecting the scaffold." We credit Clark's observations on June 9, 1998, which he photographed, and adopt as findings the information he reported from his inspection on July 15, 1998.

- e. Regarding Citation 1, Item 4, we reject Complainant's Proposed Findings of Fact No. 1, because it states the incorrect date of the inspection. We accept Complainant's Proposed Findings of Fact, Nos. 2 through 11. We accept Respondent's Proposed Findings of Fact, Nos. 2 through 6, and reject Respondent's Proposed Findings of Fact, Nos. 1 and 7.

22. Citation 1, Item 5

- a. Respondent was cited for having a deficient guardrail system on a scaffold in violation of 29 CFR § 1926.451(g)(4)(iii), which provides that:

When midrails, screens, mesh, intermediate vertical members, solid panels, or equivalent structural members are used, they shall be installed between the top edge of the guardrail system and the scaffold platform.
- b. Citation 1, Item 5 states that: a 3-stage high tubular welded scaffold had a mid railing that was 6 inches above the scaffold platform. This

citation was issued based on Clark's inspection on July 15, 1998, of the Palm Villas Building 8. During his inspection Clark noted that the scaffold was placed on the exterior of the building and there was exterior siding work to be completed. The scaffold ran the length of the building which was approximately ten stages long. The rest of the scaffold was properly protected by standard guardrailing. The fall to the ground below was 15 feet and there were rocks and materials that an employee could fall onto. Clark reported in his inspection report that, "Chris Norris will have a midrailing installed." We credit Clark's testimony that he did not see a midrail located between the scaffold's platform and the top rail.

- c. Regarding Citation 1, Item 5, we accept Complainant's Proposed Findings of Fact, Nos. 1 through 6, and 8 through 10, and reject Proposed Findings of Fact No. 7. We accept Respondent's Proposed Findings of Fact, Nos. 1 through 8, and reject Proposed Findings of Fact, Nos. 9 and 10.

23. Citation 2, Items 1, 2, and 3

- a. Respondent was cited for inadequacies in the fall protection plan reviewed by Clark during the inspection on July 15, 1998, in violation of: 1) 29 CFR § 1926.502(k)(5) for failing to document the

reasons why the use of conventional fall protection systems are infeasible or why their use would create a greater hazard such as installing floor joists and sheathing operations; 2) 29 CFR § 1926.502(k)(7) for failing to identify each location where conventional fall protection methods cannot be used and the areas classified as controlled access zones that needed to be defined by a control line; and 3) 29 CFR § 1926.502(k)(9) for failing to include a statement which provides the name or other method of identification for each employee designated to work in the controlled access zones.

- b. Clark's worksheet for Citation 2 Item 1, reported that Respondent's fall protection plan "did not document the reasons why the use of conventional fall protection systems were infeasible or created a greater hazard" as required under CFR § 1926.502(k)(5). During the inspection, Clark reported that Norris explained that during the floor sheathing there is nothing to tie off to and guardrails are infeasible because it creates a hazard to access the area to install railing. We credit Clark's assessment and review of the fall protection plan on July 15, 1998, and adopt as

findings the information he reported on his worksheet.

- c. Regarding Citation 2, Item 1, we accept Complainant's Proposed Findings of Fact, Nos. 1 and 2, Respondent's Proposed Findings of Fact, Nos. 1 and 2, and reject Respondent's Proposed Findings of Fact, Nos. 3 and 4.
- d. Clark's worksheet for Citation 2, Item 2 reported that Respondent's fall protection plan "did not identify each location where conventional fall protection methods could not be used" as required under 29 CFR § 1926.502(k)(7). Clark wrote that "the written plan instead discussed job tasks where it is sometimes infeasible or creates a greater hazard to use conventional fall protection. It also states on page 1 that in these cases, conventional fall protection may not be the safest choice for workers." Clark also noted that the CAZs were not defined by erected control lines except "yellow warning tape on the ground level" which was not provided or identified as the system being used in the fall protection plan. We credit Clark's assessment and review of the fall protection plan on July 15, 1998, and adopt as findings the information he reported on his worksheet.

- e. Regarding Citation 2, Item 2, we accept Complainant's Proposed Findings of Fact, Nos. 1 and 2, Respondent's Proposed Findings of Fact, Nos. 1, 2, and 3, and reject Respondent's Proposed Findings of Fact, Nos. 4 and 5.
- f. Clark's worksheet for Citation 2, Item 3 reports that Respondent's fall protection plan "did not provide the name of the employees allowed to work in the controlled access zones" as required under 29 CFR § 1926.502(k)(9). Clark wrote that "on page 5 of the plan it states all workers who are permitted in the CAZ shall be listed in the appropriate sections of the plan. No names were available except when I asked to see an appendix A which is referred to throughout the plan." Clark reported that at this point, he saw Respondent's employee, Tony Pasciuta, "pull out pieces of paper and I witnessed them write Appendix A on the top of the paper." We credit Clark's assessment and review of the fall protection plan on July 15, 1998, and adopt as findings the information he reported on his worksheet.
- g. Regarding Citation 2, Item 3, we accept Complainant's Proposed Findings of Fact, Nos. 1, 2, and 3, Respondent's Proposed Findings of Fact, Nos.

1 and 2, and reject Respondent's Proposed Findings of Fact, Nos. 3 and 4.

24. Citation 2, Item 4

- a. Respondent was cited for failing to fully plank scaffolds in violation of 29 CFR § 1926.451(b)(1), which provides that:

Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:

(i) Each platform unit (e.g. scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

- b. Citation 2, Item 4 was based on Clark's inspection on July 15, 1998, of Fairway Villas Building 10 where he saw one employee working on a scaffold that was not fully planked. Clark's worksheet notes that "a one stage high tubular welded

scaffold had only 2 planks as the platform." We credit Clark's testimony and adopt as findings information he reported in his worksheet.

- c. Regarding Citation 2, Item 4, we accept Complainant's Proposed Findings of Fact, Nos. 1 and 2, and Respondent's Proposed Findings of Fact, Nos. 1 and 2, and reject Respondent's Proposed Finding of Fact, No. 3.

CONCLUSIONS OF LAW

1. We have jurisdiction over this contested case pursuant to Hawaii Revised Statutes (HRS) § 396-11.
2. At all relevant times, Respondent was an employer as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and thus subject to the requirements of HRS Chapter 396, the Hawaii Occupational Safety and Health Law.
3. Complaint Photos received by HIOSH provided "reasonable grounds" to believe there may be a hazard resulting in inspections on June 9, 1998 and July 15, 1998, as required under HRS §§ 396-8(b), and 396-4(b) and Hawaii

Administrative Rules (HAR) § 12-51-11³, in response to complaints.

4. HIOSH compliance officer Clark conducted a partial inspection on June 9, 1998, as authorized under HRS § 396-4(b)(3), and properly terminated the inspection after a one-hour delay, as provided under HAR § 12-51-4.⁴ Photographs were taken by Clark on June 9, 1998, of the Construction Site while Clark waited as requested by Respondent. Clark's photographs "related to the purpose

³HAR §12-51-11 covering complaints by employees provides in part:

(b) If, upon receipt of notification, the director determines that the notice meets the requirements in subsection (a) above and there are reasonable grounds to believe that the alleged violation exists, the director shall cause an inspection to be made as soon as practicable to determine if the alleged violation exists. Inspections made pursuant to this section shall not be limited only to matters in the complaint.

⁴HAR § 12-51-4 provides as follows:

(a) Upon a refusal to permit a safety and health compliance officer, in the exercise of official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, review records, or question any employer, owner, operator, agent, or employee, in accordance with section 12-51-3 or permit a designated representative of the employees to accompany the safety and health compliance officer during the physical inspection of any workplace, the safety and health compliance officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The safety and health compliance officer shall endeavor to ascertain the reason for the refusal, and shall immediately report the refusal and the reason therefor to the director. The director shall promptly take action including compulsory process if necessary.

of the inspection” as provided under HAR § 12-51-7(b).⁵

⁵HAR § 12-51-7 outlines the conduct of inspections as follows:

(a) Subject to section 12-41-3, inspections shall take place at times and in places of employment as the director, the administrator, or the safety and health compliance officer may direct. At the beginning of an inspection, safety and health compliance officers shall present their credentials to the owner, operator, or agent in charge at the establishment, explain the nature and purpose of the inspection, and indicate generally the scope of the inspection and the records specified in section 12-41-3 which they wish to review. However, this designation of records shall not preclude access to additional records specified in section 12-51-3.

(b) Safety and health compliance officers may take environmental samples and take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent, or employee of an establishment. The term “employ other reasonable investigative techniques” includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment (such as dosimeters, pumps, badges, and other similar devices) to employees in order to monitor their exposures.

(c) In taking photographs and samples, safety and health compliance officers shall take reasonable precautions to insure that actions with equipment (such as flash- or spark-producing equipment) will not be hazardous. Safety and health compliance officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and they shall wear and use appropriate protective clothing and equipment.

(d) Inspections shall be conducted in a manner to preclude unreasonable disruption of the operations of the employer’s establishment.

(e) At the conclusion of an inspection, the safety and health compliance officer shall confer with the employer or their chosen representative and informally advise either of them of any apparent safety or health violations disclosed by the inspection. During this closing conference, the employer shall be afforded an opportunity to bring to the attention of the safety and health compliance officer any information regarding conditions in the workplace.

HAR § 12-51-14 provides in part:

Therefore, no warrant was necessary while Clark was lawfully on Respondent's premises and photographed certain construction activities in plain view. Accordingly, we accept Complainant's Proposed Conclusion of Law No. A.1 which is incorporated herein.

5. Complainant has the burden of proving a violation by a preponderance of the evidence. A prima facie case is established by showing: 1) the cited standard applies; 2) Respondent failed to comply with the standard; 3) employees had access to the hazard; and 4) Respondent knew or should have known of the hazard with the exercise of reasonable diligence.
6. HRS § 396-3, defines a "serious violation" as a violation with a substantial probability that death or serious physical harm could result.
7. We conclude the standards cited by Complainant applied to Respondent, and not the STD 3.1 exceptions to fall protection standards issued by OSHA nor the OSHA sample plan identified in 29 CFR Part 1926, Subpart M. Appendix.

(a) The director shall review the inspection report of the safety and health compliance officer. If, on the basis of the report, the director believes that the employer has violated a requirement of the law, of any standard, rule, or order adopted under the law, or of any substantive rule published in this chapter, the director may consult with the attorney general and shall issue a citation to the employer. A citation shall be issued even though, after being informed of an alleged violation by the safety and health compliance officer, the employer immediately corrects or initiates steps to correct the alleged violation. Any citation shall be issued by the department with reasonable promptness after completion of the closing conference stipulated by section 12-51-7(e). (Emphasis added).

Accordingly, we accept Complainant's Proposed Conclusion of Law No. C.4 relating to Citation 1, Items 2a, 2b, and 2c. Relating to OSHA standards, we accept Respondent's Proposed Conclusions of Law, Nos. A.1 through A.4, and A.8, and reject Respondent's Proposed Conclusions of Law, Nos. A.5 through A.7 and A.9 through A.14.

- a. We conclude the leading edge standards as described in Citation 1, Items 2a and 2b, cited as § 1926.501(b)(2)(i), applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusion of Law No. C.1, and Respondent's Proposed Conclusions of Law No. D.1.
- b. We conclude the fall protection standard as described in Citation 2, cited as § 1926.501(b)(13), applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusions of Law No. C.3.
- c. Based on the inspections conducted by Clark on June 9, 1998, and July 15, 1998, we conclude that Complainant met the burden of proving violations of: standard 29 CFR § 1926.501(b)(1) relating to fall protection as described in Citation 1, Item 1b; standard 29 CFR § 1926.501(b)(2)(i) relating to leading edge work as described in Citation 1, Item 2b; standard 29 CFR § 1926.501(b)(13) relating to fall protection as described in Citation 1,

Item 2c; standard 29 CFR § 1926.501(c) relating to the hazard of fall objections as described in Citation 1 Item 3; standard 29 CFR § 1926.451(g) (1) relating to scaffolding as described in Citation 1, Item 4; and standard 29 CFR § 1926.451(g) (4) (iii) relating to midrails as described in Citation 1, Item 5.

- d. For Citation 1, Item 1b, we accept Complainant's Proposed Conclusions of Law, Nos. 3 and 4, in part relating to Citation 1, Item 1b; and we reject Respondent's Proposed Conclusions of Law, No. C.1 through C.7.
- e. For Citation 1, Item 2b, we accept Complainant's Proposed Conclusion of Law No. C.2. We reject Respondent's Proposed Conclusions of Law, Nos. E.1 through E.8.
- f. For Citation 1, Item 2c, we accept Complainant's Proposed Conclusion of Law No. C.4 and reject Respondent's Proposed Conclusions of Law, Nos. F.1 through F.8.
- g. For Citation 1, Item 3, we conclude the standards for protection from falling objects applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusion of Law No. D.1 and Respondent's Proposed Conclusion of Law No. G.1. Based on Clark's inspection conducted on July 15, 1998,

Complainant proved that Respondent did not comply with the standard as described in Citation 1, Item 3. Accordingly, we accept Complainant's Proposed Conclusions of Law Nos. D. 2 and D.3. We reject Respondent's Proposed Conclusions of Law Nos. G.2 through G.6.

h. For Citation 1, Item 4, we conclude the scaffolding standard cited applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusions of Law, Nos. E.1 and E.2, and Respondent's Proposed Conclusions of Law, Nos. H.1 and H.2. Based on Clark's inspection on June 9, 1998, and photographs of his observations, Complainant proved Respondent did not comply with the scaffolding standard as described in Citation 1, Item 4. Accordingly, we accept Complainant's Proposed Conclusion of Law No. E.3, and reject Respondent's Proposed Conclusions of Law, Nos. H.3 through H.9.

i. For Citation 1, Item 5, we conclude the scaffolding standard cited by Complainant applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusion of Law No. I.1 and Respondent's Proposed Conclusion of Law No. I.1. Based on Clark's inspection conducted on July 15, 1998, Complainant proved that Respondent did not comply with the standard as described in Citation 1, Item

5. Accordingly, we accept Complainant's Proposed Conclusions of Law, Nos. I.2 and I.3. We reject Respondent's Proposed Conclusions of Law, Nos. I.2 through I.7.
8. We conclude the characterization of "serious" is appropriate for Citation 1, Item 1b; Citation 1, Item 2b; Citation 1, Item 2c; Citation 1, Item 3; Citation 1, Item 4 and Citation 1, Item 5.
9. We conclude the proposed penalty of \$825.00 for Citation 1, Item 3; the proposed penalty of \$3,500.00 for Citation 1, Item 4; and the proposed penalty of \$1,375.00 for Citation 1, Item 5, are appropriate.
10. Citation 1, Items 1a and 2a
- a. We conclude that Complainant failed to prove Respondent violated standard 29 CFR § 1926.501(b)(1), as described in Citation 1, Item 1a and leading edge standard 29 CFR § 1926.501(b)(2)(i), as described in Citation 1, Item 2a, because upon inspection Clark could not verify or confirm the existence of conditions depicted in the Complaint Photos on which the citations were based. We accept Complainant's Proposed Conclusions of Law, Nos. B.1 and B.2; reject, in part, Complainant's Proposed Conclusions of Law, Nos. 3 and 4, relating to Citation 1, Item 1a; accept Respondent's Proposed Conclusions

of Law, Nos. B.1 and B.9; and reject Proposed Conclusions of Law, Nos. B.2 through B.8. With respect to Citation 1, Item 2a, we reject Complainant's Proposed Conclusion of Law No. C.2. We reject Respondent's Proposed Conclusions of Law, Nos. D.2 through D.7, and accept Respondent's Proposed Conclusion of Law No. D.8.

b. Having concluded no violation as described in Citation 1, Items 1a and Item 2a, we do not reach the issue of characterization of the violation, nor the appropriate penalty.

11. For Citation 2, Items 1 through 3, we conclude that the fall protection plan standards cited as 29 CFR §§ 1926.502(k)(5), (7) and (9), applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusion of Law G, and Respondent's Proposed Conclusions of Law, Nos. J.1, K.1, and L.1.

12. For Citation 2, Items 1 through 3, we conclude that based on Clark's inspection and review of Respondent's fall protection plan on July 15, 1998, Complainant proved that Respondent's fall protection plan did not comply with the standards as described in Citation 2, Items 1 through 3 because Respondent failed to document the reasons why conventional fall protection systems could not be used; failed to identify the locations of each CAZ, and failed to properly identify the workers designated to work in a

CAZ; and to properly implement a CAZ. Accordingly, we accept Complainant's Proposed Conclusion of Law No. G, and reject Respondent's Proposed Conclusions of Law Nos. J.2 through J.7, K.2 through K.7, and L.2 through L.6.

13. For Citation 2, Items 1 to 3, we conclude the characterization of "other than serious" is appropriate.

14. For Citation 2, Item 4, we conclude the scaffolding standard cited by Complainant applied to Respondent. Accordingly, we accept Complainant's Proposed Conclusion of Law No. H.1 and Respondent's Proposed Conclusion of Law No. M.1.

15. For Citation 2, Item 4, we conclude that based on Clark's inspection conducted on July 15, 1998, Complainant proved that Respondent failed to comply with standard 29 CFR § 1926.451(b)(1). Accordingly, we accept Complainant's Proposed Conclusion of Law No. H.2 and reject Respondent's Proposed Conclusions of Law, Nos. M.2 and M.3.

16. For Citation 2, Item 4, we conclude the characterization of "other than serious" is appropriate.

ORDER

1. We affirm Citation 1, Items 1b, 2b, 2c, 3, 4 and 5; and Citation 2, Items 1, 2, 3 and 4, and the characterization and the proposed penalties imposed.

2. We vacate Citation 1, Items 1a and 2a.

Dated: Honolulu, Hawaii, OCT 11 2001.



RANDALL Y. IWASE, Chairman



CAROL K. YAMAMOTO, Member



VICENTE F. AQUINO, Member

Leo B. Young, Esq.
Frances E.H. Lum, Esq.
for Complainant

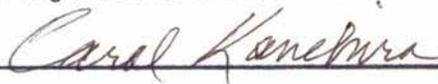
Brian Choy, Esq.
for Respondent

NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on OCT 11 2001.

I do hereby certify that the foregoing
is a full, true and correct copy of
the original on file in this office.



Carol Kanehara