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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

v.

INTERNATIONAL ROOFING & BUILDING
CONSTRUCTION, INC.,

Respondent.

CASE NO. OSH 2007-6

DECISION NO. 22

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER AFFIRMING THE
CITATION AND PENALTY

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On February 20, 2007, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or Complainant), through the Hawaii Occupational Safety and Health Division (HIOSH), issued a Citation and Notification of Penalty (Citation) to Respondent INTERNATIONAL ROOFING & BUILDING CONSTRUCTION, INC. (IRBC or Respondent). The Citation resulted from Inspection No. 310388053 conducted on January 11, 2007, and alleged in Citation 1, Item 1, a "repeat" violation of 29 CFR § 1926.501(b)(13) (employees working without fall protection) and imposed a penalty of \$10,500.00, and alleged in Citation 2, Item 1, a "serious" violation of 29 CFR § 1926.503(a)(2)(iii) (employee not trained in use of fall protection systems) and imposed a penalty of \$2,100.00. IRBC contested the Citation by letter dated and postmarked March 7, 2007.

Pursuant to the initial conference in this matter held by the Hawaii Labor Relations Board (Board) on April 3, 2007, and attended by Herbert B.K. Lau, Deputy Attorney General, for the Director, and Neal K. Aoki, Esq., for IRBC, the issues to be determined in this matter are:

- A. Whether all citation items resulting from Inspection No. 310388053, including the characterizations and penalties, are valid and proper; and
- B. Whether IRBC is entitled to the affirmative defense of unforeseeable or undiscoverable employee misconduct.

An evidentiary hearing in this matter was held on August 13, 2007. The parties filed written closing statements/post-hearing memoranda on October 3, 2007. Based on a thorough review of the entire record and the arguments presented by the parties, the Board makes the following findings of fact, conclusions of law, and order affirming the Director's Citation 1, Item 1, and its associated penalty. The Director withdrew Citation 2, Item 1, as stated by Director's counsel after the trial on August 13, 2007, and in the Director's Post-Hearing Memorandum.

FINDINGS OF FACT

1. IRBC is a licensed roofing and general contractor in the State of Hawaii. IRBC works on construction projects on Oahu and the Island of Hawaii. In conjunction with its project on the Island of Hawaii, IRBC employs twelve employees and maintains a facility at Kawaihae, Hawaii. The Kawaihae facility serves as IRBC's baseyard, as well as the residence for the Honolulu employees that work on the Island of Hawaii projects.
2. In January 2007, IRBC was subcontracted to construct a roof on a new residential home being constructed at Lot 34, Champion Ridge, Kamuela, Hawaii, 96782 (Site). Waterhouse Construction, LLC (Waterhouse), was the general contractor on the project.
3. On January 11, 2007, at approximately 10:30 a.m., occupational safety and health compliance officer Charles Clark (Clark) passed the Site while attempting to locate another worksite in the Mauna Lani area.
4. Clark saw a worker working on a roof eave, installing ceramic tile roof at the Site. The worker was not protected from falls by any visible means of conventional fall protection, i.e., guardrail system, safety net system, or personal fall arrest system (see 29 CFR § 1926.501). Without fall protection, the worker was exposed to a fall hazard.
5. Clark decided to investigate further, and parked his vehicle approximately 100 feet from the Site for about 5-10 minutes to observe and take photographs.
6. After observing the Site, Clark walked to the Site looking for the person in charge. The superintendent for Waterhouse approached Clark, and Clark identified himself as a HIOSH safety compliance officer and explained his purpose on the Site. The superintendent identified the roofing subcontractor and Clark asked if he could speak to the workers about fall protection. Clark approached the two men who descended from the roof. He obtained their identities and statements from them.

7. Clark asked the workers if they had received fall protection training from their employer and whether they had any fall protection equipment. One of the workers responded that no one was going to fall off the roof. The workers also told Clark that they had been trained in fall protection, and they had harnesses and lifelines, and that anchorage points had been installed on the roof. Clark also learned from them that they had begun work on the roof about one hour prior to his arrival.
8. Clark met IRBC's foreman, Gaudencio Barrientos (Barrientos), who had limited English skills but told Clark that he started work that morning with his crew.
9. During the time period when Clark had been talking to the Waterhouse superintendent, Clark observed another worker working in the adjacent roof without fall protection; however, Clark was not able to take a photograph of that worker, who was not wearing any harness, nor was there any form of conventional fall protection protecting him; Clark subsequently learned that this worker also worked for IRBC.
10. Although the workers asserted that they had harnesses and lifelines, and that anchorage points had been installed on the roof, Clark did not see any anchorage points or lifelines on the roof. Furthermore, none of the workers were wearing harnesses, and there were no guardrails or safety nets installed on the roof. Clark did not observe any harness, lanyard, or lifeline at the Site.
11. The roof eave section was approximately 90% completed. It would have required about one or two days of work to have reached that stage of completion.
12. The pitch of the roof was 4/12, that is, there was four feet of rise for every twelve feet of run. Clark learned this from the Waterhouse superintendent and from the workers. The distance between the edge of the roof and where the worker was observed and the ground below was about ten feet. Clark measured the distance with a tape measure. The worker was working about one foot from the edge of the roof. The Board finds that the probability of injury occurring to the worker, working approximately one foot from the edge of the roof, is appropriately characterized as "greater."
13. The surface of the ground below consisted of concrete and lava rock. If someone were to have fallen, the person would likely have sustained a fracture-type injury. The Board finds that the possible injury, a fracture, is appropriately characterized as "medium" in severity.

14. Clark talked to Samuel Villena (Villena), IRBC's project manager. Villena sent to Clark via facsimile copies of certificates for those workers who had attended fall protection training with Safety Systems of Hawaii, Inc., which is a formal training for employees. No training certificate was provided for one of the workers observed by Clark, Niervin Villator (Villator).¹
15. Villator was hired in June of 2006,² and had not attended the Safety Systems fall protection training class at the time of the January 11, 2007, inspection, but was scheduled to attend it later in 2007.³ Villena stated that Villator had been trained through IRBC's weekly toolbox safety meetings. When asked by Clark whether any of the toolbox meetings included instruction of how to set-up, use, and inspect fall protection, Villena said that the toolbox meetings did not cover those areas.
16. The toolbox meetings last approximately 15-20 minutes and cover safety points that are obtained from the Jobsite Safety Plan. The toolbox meetings are oral and demonstrations are not provided because it is assumed the workers learned the basics of fall protection from the initial in-house training.
17. Villator received IRBC's in-house safety training on his first day of work, June 26, 2006, and signed an acknowledgment of IRBC's Jobsite Safety Plan and Jobsite safety Rules and Regulations.
18. The in-house training lasts approximately one hour. It covers the Jobsite Safety Plan, which consists of one sheet and 18 safety points, including inspection of personal protective equipment, use of ladders, use of proper footwear, maintaining 100% fall protection, following proper dress code, housekeeping/clean-up, parking of vehicle/trucks, use of seat belts, drugs and alcohol, eye protection, and other topics.
19. IRBC has a written Fall Protection Plan. On their first day of work, employees get personal fall protection equipment issued to them, which they are supposed to bring to work every day. The written Fall Protection Plan is not part of the

¹It was stipulated by the parties that Villator was the worker who had not received Safety Systems fall protection training at the time of the January 11, 2007, inspection.

²Transcript of hearing held on August 13, 2007, p. 78; Respondent's Exhibit A, p. 61.

³Villator ended up attending the Safety Systems of Hawaii, Inc., training in February 2007.

in-house training given to new hires. It is attached to the employee policy that employees get when they “sign the application and they get the job[.]”

20. IRBC has a disciplinary policy that subjects violations of the Jobsite Safety Rules and Regulations to verbal warning for a first offense, written warning and letter to personnel file for a second offense, probation and/or suspension for three (3) days without pay for a third offense, and termination for a fourth offense.
21. Villena oversaw four projects on the Island of Hawaii during the time of the alleged violation here. He tried to visit the project sites twice per day. However, on the day of the inspection, Villena had not yet visited the Site.
22. At each project site there is a foreman. In the present case, Barrientos was the working foreman at the Site who was responsible for supervising employees and ensuring the employees followed the safety rules. Barrientos was also the working foreman of IRBC’s project that was previously cited by the Director on January 9, 2006, and resulted in a Stipulation and Settlement Agreement filed with the Board on May 31, 2006.
23. One of the workers, Anatalio Domingo (Domingo), observed by Clark without fall protection on January 11, 2007, had been disciplined by IRBC on January 8, 2007, for working on a roof without wearing a safety line and hard hat. This occurred at the same jobsite, Champion Ridge. Villena counseled Domingo in front of the other workers, including Villator and Barrientos. Barrientos told Villena that he didn’t see Domingo go up on the roof, so Villena reminded Barrientos to make sure that Domingo wore his line correctly.
24. As a result of Clark’s inspection on January 11, 2007, IRBC disciplined Villator (verbal warning) and Domingo (written warning).
25. IRBC does not dispute that the workers observed by Clark were not protected by any fall protection equipment. Based on Clark’s inspection, Villator and Domingo were disciplined for violating IRBC’s Fall Protection Plan and Jobsite Safety Rules and Regulations. At the time, Barrientos was working on the ground on the other side of the building and did not notice the safety violations. Barrientos reported that when he checked on the workers earlier that morning, they all had on their personal safety equipment.
26. IRBC opined that adopting a stricter discipline policy to address the problem of workers not using appropriate fall protection would not be effective because IRBC would end up not having enough workers in view of the tight job market on the Island of Hawaii.

27. IRBC has engaged in construction projects on the Island of Hawaii since 2002, and throughout that time period has not had any employees suffer any accident or injury relating to fall protection.
28. Citation 1, Item 1, alleged 29 CFR § 1926.501(b)(13) was violated because two employees working on a roof without fall protection were exposed to serious injuries in the event of a fall to the lower level. The violation was characterized as “repeat.” A penalty of \$10,500.00 was imposed.
29. IRBC was previously cited for a violation of 29 CFR § 1926.501(b)(13) in Inspection No. 306260373, Citation 1, Item1, issued on July 28, 2003,⁴ and resulted in a Settlement Agreement with reduction of penalty to \$563.00; and/or Inspection No. 308488238, Citation 1, Item 1, issued on August 2, 2005,⁵ and resulted in a Settlement Agreement and reduction of penalty to \$2,100.00; and/or Inspection No. 309454726, Citation 1, Item, 1, issued on January 9, 2006,⁶ and resulted in a Stipulation and Settlement Agreement, dated May 31, 2006, with reduction of penalty to \$4,500.00.
30. Residential construction was being performed at the Site. The distance from the roof to the ground was ten feet. The workers observed by Clark were working on the roof area without any type of fall protection. It was feasible to use personal fall arrest systems at the Site.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.
2. IRBC is an employer within the meaning of HRS § 396-3, which provides in relevant part:

“Employer” means:

⁴This citation alleged, “Two employees were observed working on a roof that was 17 feet above the lower level without any type of fall protection.”

⁵This citation alleged, “Two employees were working twenty feet above the lower level on a roof without any means of fall protection. The potential of the fall to a lower level will result in a serious injury.”

⁶This citation alleged, “An employee without any type of fall protection was installing roof tiles three stories above the lower level.”

* * *

- (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.
3. To establish a violation of a standard, the Director must prove by a preponderance of the evidence⁷ that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. Director v. Maryl Pacific Constructors, Inc., OSAB 2001-18 (6/13/02).
4. 29 CFR § 1926.501(b)(13) provides in relevant part:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, 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 § 1926.502.⁸
5. 29 CFR § 1926.501(b)(13) is incorporated in Title 12, Subtitle 8, Part 3, Chapter 121.2, of the Hawaii Administrative Rules (HAR), Department of Labor and Industrial Relations, Division of Occupational Safety and Health, Construction Standards, Fall Protection, by HAR § 12-121.2-1.
6. The standard 29 CFR § 1926.501(b)(13) applies to the present case. Residential construction was being performed at the Site (installation of roofing material); the workers observed by Clark were working on the roof area that is ten feet above the ground and thus were exposed to a fall hazard; and use of a personal fall arrest system or other protection articulated in § 1926.501(b)(13) was feasible.

⁷HRS § 91-10(5).

⁸There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the 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 § 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

7. IRBC failed to comply with the standard. There was no fall protection system, either personal fall arrest system, guardrail, or safety net system, being utilized at the Site when Clark observed the workers. Although the workers had been provided personal fall arrest systems, the two workers observed by Clark were not utilizing such systems.
8. The worker photographed by Clark was working approximately one foot from the edge of the roof. The roof was approximately ten feet from the ground. If a worker fell, he would likely sustain a fracture-type injury. Accordingly, the workers were exposed to a fall hazard.
9. IRBC knew or could have known of the violation with the exercise of reasonable diligence. Barrientos was a working foreman at the Site that day. He had the ability, and the responsibility, to supervise the workers and ensure that they utilized fall protection systems. Barrientos should have checked on the workers periodically, and would have discovered their failure to use fall protection systems.
10. Villena, the project manager, also had the responsibility to ensure the workers were in compliance with IRBC's safety rules. He testified that his usual procedure was to check on each project site twice a day, once in the morning and once in the afternoon; however, he did not check on the Site the morning of Clark's inspection.
11. Additionally, IRBC knew that a worker had failed to use proper fall protection at the Site only three days prior to Clark's inspection, thus indicating a need for more frequent periodic inspections by the working foreman and project manager.
12. Citation 1, Item 1, was properly characterized as "repeat." A violation is repeated if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. Director v. Kiewit Pacific Co., OSAB 94-009 (3/1/96).
13. IRBC was previously cited for a violation of 29 CFR § 1926.501(b)(13) in Inspection No. 306260373, Citation 1, Item 1, issued on July 24, 2003; Inspection No. 308488238, Citation 1, Item 1, issued on August 2, 2005, and Inspection No. 309454726, Citation 1, Item, 1, issued on January 9, 2006. These previous citations are substantially similar to the present citation.

14. The penalty associated with Citation 1, Item 1, was calculated according to HIOSH's standard policies and procedures. The penalty was determined by considering the severity of an injury if an accident occurred, the probability of an accident, and certain mitigating circumstances. The possible injury, a fracture, was given a severity of "medium," and it was determined that the probability of such injury was "greater" because the worker was only about one foot from the edge of the roof. The combination of a "medium" severity and "greater" probability resulted in a gravity-based penalty of \$8,750.00. However, the figure was doubled (to \$17,500.00) because of there was a repeat violation. The penalty was also adjusted in consideration of IRBC's size. IRBC employed 40 workers at the time of the citation, and therefore enjoyed a 40% reduction of the penalty. No adjustment was given for good faith or history because it was a repeat violation. Accordingly, the final penalty amount was \$10,500.00. The Board finds that the final penalty amount is just and proper.
15. IRBC raises the affirmative defense of employee misconduct. In Director v. Kiewit Pacific Company, OSAB 94-009 (3/1/96), the Appeals Board adopted the following: the affirmative defense is sustained when the employer establishes (1) the employer has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to detect and correct violations, especially if there were incidents of prior non-compliance; and (4) it has effectively enforced the rules when violations have been discovered.
16. The Board concludes that IRBC has established the first and fourth elements of the affirmative defense articulated in Kiewit Pacific Company. IRBC has a written Fall Protection Plan (Respondent's Exhibit C). On their first day of work, employees get personal fall protection equipment issued to them, which they are supposed to bring to work every day. IRBC also has a Disciplinary Action Policy (Respondent's Exhibit B) that subjects violations of the Jobsite Safety Rules and Regulations to verbal warning for a first offense, written warning and letter to personnel file for a second offense, probation and/or suspension for 3 days without pay for a third offense, and termination for a fourth offense. Further, IRBC disciplined Domingo on January 8, 2007, when it discovered that he had been working on a roof without wearing a safety line and hardhat, at the same jobsite. Villena counseled Domingo in front of the other workers, including Villator and Barrientos. Barrientos told Villena that he didn't see Domingo go up on the roof, so Villena reminded Barrientos to make sure that Domingo wore his line correctly. As a result of Clark's inspection on January 11, 2007, IRBC disciplined Villator (verbal warning) and Domingo (written warning).

17. The Board concludes that IRBC has not met the second and third elements of the affirmative defense. Although Villator started work on June 26, 2006, he had not been given formal safety training until February of 2007, after the January 11, 2007, inspection. While Villena stated that Villator had been trained through IRBC's weekly toolbox safety meetings, when asked by Clark whether any of the toolbox meetings included instruction of how to set-up, use, and inspect fall protection, Villena said that the toolbox meetings did not cover those areas. Furthermore, the toolbox meetings last approximately 15-20 minutes and cover safety points that are obtained from the Jobsite Safety Plan (which itself has 18 different safety points on various subjects). The toolbox meetings are oral and demonstrations are not provided because it is assumed the workers learned the basics of fall protection from the initial in-house training. The in-house training, however, lasts only approximately one hour, and covers all of the 18 safety points of the Jobsite Safety Plan during that one-hour period. On their first day of work, employees get personal fall protection equipment issued to them, which they are supposed to bring to work every day. The written Fall Protection Plan is not part of the in-house training given to new hires; rather, employees receive the Fall Protection Plan as simply an attachment to the employee policy given to new hires. Accordingly, the Board concludes that IRBC did not adequately communicate its Fall Protection Plan and safety rules to Villator, one of the employees observed by Clark.

18. IRBC has not taken adequate steps to detect and correct violations, especially where IRBC knew there were prior incidents of non-compliance. When Domingo was discovered not wearing a safety line or hard hat on January 8, 2007 (three days before Clark's inspection), Barrientos, the working foreman, told Villena that he didn't see Domingo go up on the roof, so Villena specifically reminded Barrientos to make sure that Domingo wore his line correctly. Despite being put on notice, IRBC did not adequately supervise or monitor the workers on January 11, 2007, or it would have discovered that the workers were not utilizing fall protection systems. Additionally, Villena, the project manager, had the responsibility to ensure the workers were in compliance with IRBC's safety rules, and he testified that his usual procedure was to check on each project site twice a day, once in the morning and once in the afternoon, yet he did not check on the Site the morning of Clark's inspection. Accordingly, the Board concludes that despite the need for more frequent periodic inspections by the working foreman and project manager, IRBC failed to take adequate steps to detect and correct violations, especially where there were incidents of prior non-compliance.

19. The Board concludes that IRBC has not established the affirmative defense of employee misconduct. Although IRBC cites to several cases where the

employer was not held responsible for employees' failure to utilize safety equipment, the Board finds the present case distinguishable. Here, there was no isolated incident of employee misconduct; rather, IRBC was aware that it had a problem with employees not following the safety regulations. Further, it cannot be said the IRBC did everything within its power to prevent such violation, as IRBC failed to adequately train Villator on the proper use, and importance, of its fall protection systems and failed to adequately monitor the Site after it had been put on notice that the employees were not following proper safety procedures.

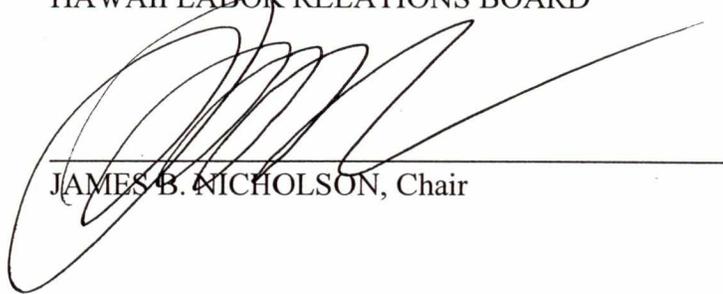
20. The Board therefore affirms the Citation 1, Item 1, and its associated penalty.

ORDER

For the above-discussed reasons, the Board hereby affirms Citation 1, Item 1, and its associated penalty of \$10,500.00.

DATED: Honolulu, Hawaii, November 6, 2007.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



A handwritten signature in black ink, appearing to read 'Emory J. Springer', is written over a horizontal line.

EMORY J. SPRINGER, Member



A handwritten signature in black ink, appearing to read 'Sarah R. HiraKami', is written over a horizontal line.

SARAH R. HIRAKAMI, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Decision at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this order to a duly recognized representative of the employees.

Copies sent to:

Herbert B.K. Lau, Deputy Attorney General

Neal K. Aoki, Esq.