STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and COASTAL CONSTRUCTION CO., INC., Respondent.	CASE NO. OSH 2009-36 DECISION NO. 29 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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

Following a *de novo* proceeding before the Hawaii Labor Relations Board (Board), and for the reasons discussed below, the Board affirms in part the Citation and Notification of Penalty (Citation); modifies the characterization of the violation from "repeat serious" to "serious" and the penalty from $10,000 to $2,000 based on the modification of the characterization of the violation; and remands to the Complainant DIRECTOR (Director), DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Department) and Department, Occupational Safety and Health Division (HIOSH) for consideration of the issues of whether the there was a "good faith" abatement by Respondent COASTAL CONSTRUCTION CO., INC. (Respondent) after issuance of the Citation, and if so, whether a reduction of the penalty is warranted on this basis in the above-captioned matter. The Board members thoroughly reviewed all the evidence and arguments presented, and issue these proposed findings of fact, conclusions of law, and decision and order pursuant to Hawaii Revised Statutes (HRS) § 91-11, which provides in relevant part:

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

afforded to each party adversely affect to file exceptions and present argument to the officials who are to render the decision[.]

Any conclusion of law improperly designated as a finding of fact, shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact. To the extent the parties' post-hearing memoranda, including Respondent's Exceptions and Director's Opposition to Respondent's Exceptions as such terms are defined herein below, contain what may be construed as proposed findings of fact, any such facts submitted by a party that are not incorporated as a Board finding herein or that are clearly contrary to the findings herein, are denied.

I. PROCEDURAL HISTORY

On August 11, 2009, the Board received from the Director, a Notice of Contest regarding a Citation and Notification of Penalty (Citation) issued to Respondent on July 9, 2009, and resulting from Inspection Number 311437206 which was conducted on March 5, 2009 (Inspection), by HIOSH. The Director cited a "repeat serious" violation of 29 CFR 1926.501(b)(13) and assessed a penalty of $10,000.00. Respondent contested the Citation by letter to HIOSH dated July 23, 2009, which was received by HIOSH on July 27, 2009.[1]

A pre-trial conference/settlement conference was held on January 21, 2010, and a May 18, 2010 trial date was agreed to by the parties.

On May 18, 2010, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board.[2] Following the evidentiary hearing, the Director and Respondent submitted post-hearing memoranda supporting their respective positions on June 30, 2010.

By Order No. 681, the Board issued its Proposed Findings of Fact, Conclusions of Law, and Decision and Order on August 24, 2015 (PFFCL). On September 1, 2015, Respondent filed Respondent's Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order Efiled August 24, 2015 as Order No. 681, together with Exhibits "A" – "D" (collectively called "Respondent's Exceptions"). The Director did not file any exception to Order No. 681; however, on September 29, 2015, the Director filed Director's Memorandum in

[1] Respondent has only contested the Citation and penalty regarding its employee's failure to use fall protection safety equipment. Thus, the proceedings before the Board in this case are solely limited to this issue and not the other citations issued in the Citation.

[2] While Board Chair Komatsubara and Board Members Moepono and Ley did not participate in the hearing in this matter, they have reviewed the entire record, including the pleadings and exhibits filed in this case.

Opposition to Respondent's Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order Efiled August 24, 2015 as Order No. 681 (Director's Opposition to Respondent's Exceptions).

On October 9, 2015, the Board conducted a hearing on Respondent's Exceptions and arguments from the parties were presented and received by the Board.

II. FINDINGS OF FACT

A. The Inspection.

Respondent is a construction general contractor and was performing construction work in the Lanamilo Homestead project on Alaneo Street in Kamuela, Hawaii (Kamuela Work Site). The construction project consisted of several single and two-story residential homes.

HIOSH compliance officer Charles Clark (Clark) was assigned to perform a general scheduled inspection of the Kamuela Work Site on March 5, 2009 at approximately 9:45 a.m. Upon his arrival there, Clark saw two men working on the top of a single-story residential structure without any visible means of fall protection. One of the men was carrying sheets of plywood across the roof and throwing them to the ground. The other man was kneeling just beyond the ridgeline of the roof, so Clark was not able to see what he was doing on the roof. According to Clark, neither of the two men was wearing safety harnesses, and there was no personal fall arrest system nor was there any guardrail or safety net system in place along the roof. Clark also testified that he did not observe any lifelines or lanyards on the roof sheathing, nor did he see any anchorage points on the sheathing ridgeline for the men to tie-off onto. Clark testified that he believed the two men were exposed to a fall hazard.

Clark took photos of the two men working on the roof and then proceeded to Respondent's site office to speak with the person-in-charge. Clark was instructed to speak to Chris Okamura (Okamura), Respondent's project superintendent. Okamura was not at the Kamuela Work Site that day, and he instead was at Respondent's Hilo project. Clark spoke to Okamura by telephone, and Okamura instructed Clark to speak with Mikaele Yam (Yam), the working foreman of the Kamuela Work Site and the person who would act as the Respondent's representative in Okamura's absence. Clark spoke with Yam and then proceeded back to the Kamuela Work Site where he earlier observed the two men working on the roof.

Clark interviewed the two workers, Jaryd Taise (Taise) and Jeff Estabillio (Estabillio). Although these two workers were not wearing safety harnesses when Clark first saw them working on the roof, the two workers were wearing safety harnesses when Clark went back to the work site

to interview them. The two workers admitted that earlier that morning they had removed the anchorage points on the roof and had been working without fall protection. Clark later obtained from Respondent a copy of an incident report which confirmed that the roof sheathing was about 98% completed when the workers violated the company's safety procedures and removed the anchorage points and worked on the roof without fall protection.

Clark measured the ground-to-eave height at 8 feet, 6 inches. Construction debris was strewn on the ground below the eaves. Yam told Clark that the pitch of the roof was 5/12. Clark testified that he was of the opinion that the worker should have been tied-off to a personal fall arrest system, and that a worker would likely sustain a fracture or contusions if the worker fell to the ground below.

B. Clark's Evaluation of an Employee Misconduct Defense.

Clark gave consideration to an affirmative defense of employee misconduct. Clark found that Respondent had established a set of work rules regarding fall protection (Fall Protection Rules), which it adequately communicated to its workers, thus meeting the first two elements of the affirmative defense. However, Clark determined that Respondent could not meet the third and fourth elements of the affirmative defense because Respondent had not taken appropriate steps to discover violations of its Fall Protection Rules and had not effectively enforced its Fall Protection Rules when violations were discovered.

Clark testified at the evidentiary hearing that although Okamura was responsible for conducting daily safety inspections of the Kamuela Work Site, he was not always at that site because his superintendent responsibilities required him to split his time between the Kamuela and Hilo work sites.

Also, Clark claimed that although Respondent kept inspection checklist forms in its safety and health program folder, it failed to keep written records of daily inspections and failed to produce copies of any such records when requested by Clark.

Okamura allegedly told Clark that when he discovered serious violations of safety rules, he only issued verbal warnings. Although Respondent's written disciplinary procedures are vague, as admitted to by Respondent's safety coordinator Mike Hokama, Clark testified that he interpreted the procedures to require company documentation of all first violations and verbal warnings to the violators. Okamura explained to Clark that Okamura only gave verbal warnings because he had a good relationship with his workers and believed that verbal warnings were sufficient to correct any type of work safety violation.

D. Penalties under the Citation.

On July 9, 2009, HIOSH issued a Citation and Notification of Penalty to Respondent. Citation 1, item 1 alleged a "repeat serious" violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR]. To support HIOSH's "repeat" classification, HIOSH relied upon the prior settlement agreement in Inspection No. 309461796, which was approved by the Director on September 27, 2006. This prior case against Respondent involved the Kanani Wailea project (Kanani Wailea).[3] A $10,000.00 penalty was proposed based upon the March 9, 2009 inspection.

Clark testified that the $10,000 penalty was calculated according to HIOSH's standard policies and procedures to avoid any arbitrary determination by the individual inspector. It 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, fracture and contusion, was given a severity of "medium" and it was determined that the probability of such an injury was "2." The combination of a "medium" severity and a "2" probability, multiplied by 5 because Respondent was cited for a similar violation within three years of the Inspection, resulted in a raw gravity-based penalty of $10,000.00.

The gravity-based penalty can be adjusted downward when considering the size of the company, the good faith of the company, and past history. In this case, Clark did not reduce the $10,000 penalty because the Respondent is a large company with over 250 employees,[4] Respondent was cited for similar violations in the past three years, and Respondent got a "zero" adjustment for good faith and "zero" for past history.

E. Respondent's Challenge of the Citation.

Respondent has three separate challenges of the Citation and penalty.

First, Respondent relies on the affirmative defense of employee misconduct. Respondent objects to Clark's conclusion that this affirmative defense "does not apply because only verbal reprimands were given prior to the incident on 3/5/09 which suggests an ineffective disciplinary program." In addition, Respondent disputes Clark's claim that Okamura said that he only gave verbal reprimands to his workers who disregarded serious safety issues.

---

[3] The settlement agreement involved a Citation and Notification of Penalty issued to the Respondent on September 6, 2006, which citation alleged a violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] for the Kanani Wailea project.

[4] Clark was told that Coast had 400 employees as of the time of the Inspection.

Second, Respondent argues that Clark's "repeat" classification of the violation is wrong because Respondent did not commit a repeat offense. Respondent cites a prior HIOSH decision of the Labor and Industrial Relations Appeals Board (Labor Appeals Board)[5] where it found that "a violation is repeated if, at the time of the alleged repeat 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) (Kiewit). Clark's attempt to claim that the violation in this case is a repeat of the violation in the Kanani Wailea case, according to Respondent, is flawed and does not meet the requirements set forth in Kiewit because: (i) there is no final order against Respondent in the Kanani Wailea case; and (ii) the Director failed to present any evidence to show that the violation in this case is a "substantially similar violation" to the violation in the Kanani Wailea case.

Third, although it is not explicitly clear that Respondent has raised this challenge, it seems that Respondent has objected to Clark's failure to reduce the penalty for considerations regarding "good faith." Clark does not dispute that he disregarded reducing the penalty for "good faith" actions to correct and abate future violations because he considered Respondent to be a "repeat" offender, and therefore, not eligible for such a reduction in penalty. Respondent submitted proof at the evidentiary hearing that Taise and Estabillio were immediately suspended for their violation of the Fall Protection Rules on March 5, 2009, and further evidence was submitted to show that Respondent has made the effort to retrain the employees and provide additional training to its employees regarding the Fall Protection Rule.

III. CONCLUSIONS OF LAW

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

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

> "Employer" means:
>
> * * *
>
> (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

The issues to be determined at trial were:

---

[5] Prior to June 6, 2002, the Labor Appeals Board handled all appeals of the Director's decisions involving HIOSH citations.

A. Whether HHC violated OSHA Standard 29 C.F.R. § 1926.501(b)(13) as set forth in the Citation;

B. Whether the characterization of the subject notice of violation as "repeat serious" is correct;

C. Whether the affirmative defense of employee misconduct is appropriate for this case; and

D. Whether the penalty of $10,000.00 assessed by the Director is correct.

A. Respondent Violated OSHA Standard 29 C.F.R. § 1926.501(b)(13) as Set Forth in the Citation.

To establish a violation of a standard, the Director must prove by a preponderance of the evidence 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 should have known of the condition with the exercise of due diligence.

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

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

1. The cited standard applies.

29 CFR § 1926.501(b)(13) provides in relevant part:

> Residential construction. Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be 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 § 1926.502.

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.

The standard in 29 CFR § 1926.501(b)(13) applies to the present case since the evidence shows that residential construction was being performed by Respondent at the Kamuela Work Site on March 5, 2009, the two men working on the roof were about eight feet and six inches above the ground and thus they were exposed to a fall hazard, and the use of a personal fall arrest system or other protection articulated in 29 CFR § 1926.501(b)(13) was feasible.[6] Respondent does not dispute these facts, and therefore, the Board finds that the Director has met its burden of proving by a preponderance of the evidence that the cited standard in the Citation applies to this case.

2. There was a failure to comply with the cited standard.

Respondent failed to comply with the standard because the evidence shows that there was no fall protection system at the Kamuela Work Site on March 5, 2009. There was no personal fall arrest system, guardrail, or safety net system being utilized by the two men when Clark observed them on that day in the early morning. Respondent also does not dispute these facts, and therefore, the Board finds that the Director has met its burden of proving by a preponderance of the evidence that Respondent failed to comply with the cited standard in the Citation.

3. An employee had access to the violative condition.

[6] There is a presumption that the fall protection systems articulated in 29 CFR § 1926.501(b)(13) are feasible and will not create a greater hazard to use these systems. Respondent did not claim to have developed and implemented a fall protection plan other than that set forth in 29 CFR § 1926.501(b)(13).

The evidence in the record shows that both Taise and Estabillio were working on the roof, which was approximately eight feet and six inches from the ground, construction debris was strewn on the ground below the eaves of the roof, and a fall off of the roof by the men would likely have caused them to sustain fractures and or contusions. Accordingly, the two men were exposed to a fall hazard. Respondent also does not dispute this evidence, and therefore, the Board finds that the Director has met its burden of proving by a preponderance of the evidence that Taise and Estabillio had access to the violative condition.

4. The employer knew or should have known of the condition with the exercise of due diligence.

Respondent does not dispute that working on the roof is dangerous and that safety precautions are necessary in order to protect its workers in the event of a fall. Fall Protection Rules were adopted by the Respondent and in effect on March 5, 2009, which indicates that Respondent knew of the potential dangers of working in the roof and the need to oversee and enforce its Fall Protection Rules.

According to the Respondent, Taise and Estabillio were using a tie-off fall protection system on March 5, 2009, but they removed the anchor points before re-ascending to remove rubbish from the roof. They had completed 98% of the job and dismantled their fall protection system before going back onto the roof. Respondent is not arguing that compliance with work safety rules is acceptable if practiced some, but not all of the time. Instead, Respondent is claiming that under the "employee misconduct" affirmative defense, an employer will be excused from fault for a work safety violation if the four-element test under Kiewit is met by the employer.

The Board finds that the Director has met its burden of proving by a preponderance of the evidence that Respondent knew or should have known of the hazardous condition with the exercise of due diligence, however, the issue regarding the "employee misconduct" defense is further discussed in Section III.C. below.

B. The Characterization of the Subject Notice of Violation As "Repeat Serious" Is Partially Incorrect.

Respondent does not challenge the Director's characterization of the violation as being "serious" since it is not disputed that the roof that Taise and Estabillio were working on was more than six feet above the ground and that they both faced a substantial probability of death or serious physical harm due to the existence of the violative condition. If anything, Respondent's actions to suspend both Taise and Estabillio after receiving notice of their violation of the company's Fall Protection Rules is an acknowledgement by Respondent of the seriousness of the violation.

The challenge, however, is to the "repeat" classification of the violation. Under the Kiewit Decision, before a repeat classification can be attached there must be "a final order against the same employer for a substantially similar violation." Id. The Director based the "repeat" classification in this case on the citation issued against Respondent in the Kanani Wailea case.

The Kanani Wailea case was resolved by settlement which included the following in Paragraph 9 of the settlement agreement which was signed by the parties on September 25, 2006 and approved by then-Director Nelson B. Befitel on September 27, 2006 (KW Agreement):[7]

> 9. The employer agrees and understands that if employer fails to comply with each and every term of this agreement, this agreement shall be null and void upon written notice by the Director and the original citation(s) and penalties issued on September 6, 2006, shall become a final order.

A careful examination of Paragraph 9 supports Respondent's contention that there is no "final order" issued against Respondent in the Kainani Wailea case. Paragraph 9 states that the citation and penalty issued in the Kainani Wailea case becomes a "final order" only if Respondent failed to comply with the terms of the KW Agreement, which also means that there is no "final order" in the Kainani Wailea case if Respondent complied with all of the terms and conditions of the KW Agreement.

The Director did not submit any evidence that Respondent failed to comply with any of the terms of the KW Agreement. The Director also failed to address in its Post-Hearing Memorandum the entire issue as to whether there was a "final order" issued against Respondent in the Kainani Wailea case.

Since the Director did not make any attempt to prove that Respondent breached the terms of the KW Agreement, and since the Director never argued during the evidentiary hearing and in its Post-Hearing Memorandum that a "final order" was issued in the Kanani Wailea case, this Board cannot find that a "repeat" classification for Respondent's violation in the Citation is justified or proper. The Board finds and concludes that the Director's finding that the characterization of Respondent's violation as being "repeat serious," but not "serious," is incorrect.

---

[7] The KW Agreement also provides that "if [the] Settlement Agreement is not executed and returned to HIOSH by September 25, 2006, **then** the citation(s) and penalties issued on September 6, 2006, will become a **final order** of the Director of the Department of Labor and Industrial Relations." (Emphasis added) There was no evidence submitted at the evidentiary hearing to indicate that the KW Agreement was not signed and delivered to HIOSH in a timely fashion.

C. Respondent Failed to Establish the Affirmative Defense of Employee Misconduct.

In the Kiewit decision cited above, the Labor Appeals Board adopted the affirmative defense of "employee misconduct." The Board held that this affirmative defense is sustained when the employer establishes that (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. This Board, in turn, adopts the four-part test applied by the Labor Appeals Board in Kiewit regarding the affirmative defense of employee misconduct.

"[T]he basic premise of this defense is that it would be unfair and would not promote employee safety and health to penalize an employer for conditions that were unpreventable and not likely to recur." Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Board, 167 Cal. App. 3d 1232 (Cal. Ct. App. 1st Dist. 1985) (*citing* Rothstein, Occupational Safety and Health Law, (2d ed. 1983) Compliance with Standards, § 117, p. 143).

In applying the four-part test, Clark was of the initial opinion that Respondent met the first three elements of the "employee misconduct" affirmative defense but could not meet the fourth element. The Citation was issued based on Clark's judgment that only the fourth element was lacking in Respondent's "employee misconduct" defense. At the evidentiary hearing, however, Clark and the Director claimed that Respondent had an "ineffective disciplinary program" and failed the third and fourth elements.

Regarding the third element, Clark and the Director claim that Respondent does not meet the requirements of this element because (i) Respondent did not maintain written records of its periodic inspections of its workers at the Kamuela Work Site, and (ii) Respondent's periodic inspections of the Kamuela Work Site were insufficient.

Clark testified on cross-examination that written logs are only required when a company has 30 or more employees on a work site according to HIOSH's published standards. Regardless of the HIOSH standards, however, Clark testified that even if Respondent had only 17 employees on the Kamuela Work Site, he required documentation of periodic inspections because HIOSH's **unpublished** Field Operations Manuel (FOM) advised inspectors to only accept written proof of periodic inspections as proof of this element of the defense. He further testified that the unpublished standard advocated in the FOM was available only to HIOSH and their inspectors and was not available to the general public. Respondents object, and the Board agrees with Respondent's objection to HIOSH's decision to require employers, regardless of the number of

workers on the work site, to maintain written records of periodic inspections. If this is the new policy and approach of HIOSH, this should be made known to the public before enforcement.

Regarding the sufficiency of Respondent's periodic inspections of the Kamuela Work Site, the Board understands Respondent's confusion as to HIOSH's interpretation of the requirement to conduct "periodic inspections." There is no written definition or standard and it seems that HIOSH has left this determination to the individual inspectors to make on their own. Clark testified that "periodic inspections" meant "once a week" to him if the employer has less than 30 workers at the work site, but yet he faulted Okamura for not performing daily inspections of the Kamuela Work Site which had only 17 workers at the Kamuela Work Site. The Board finds disturbing the lack of a clear and understandable standard regarding the requirement for "periodic inspections" for compliance of work safety rules and laws. As such, the Board finds in Respondent's favor on the issue of compliance with the third element of the "employee misconduct" defense.

The Board suggests that HIOSH address this issue and adopt and announce a clear definition for "periodic inspections" for the benefit of the employers and their workers. In addition to a clear definition as to how often the inspections should be done, it would be appropriate for HIOSH to also address the types of inspections, e.g., spot or unannounced inspections vs. scheduled or announced inspections.

With respect to the 4th element, Clark's position that Okamura's issuance of verbal warnings to violators of the Fall Protection Rule is not an effective enforcement of the rules, is supported by the evidence, since Okamura's practice of only issuing verbal warnings is contrary to Respondent's written disciplinary policy set forth in Item 9 of its Employee Orientation Safety Check List.[8] According to this policy, a first time violator should receive a verbal reprimand and the violation should be documented and placed in the violator's work file. The Board in the PFFCL stated its preliminary position that Respondent failed to meet the fourth element of the "employee misconduct" affirmative defense for the reasons stated above. In Respondent's Exceptions, it raised the following three grounds of challenge to the Board's conclusions regarding Element 4: (1) Respondent challenges Clark's credibility and questions the Board's acceptance of Clark's testimony over Okamura's testimony regarding an alleged statement made by Okamura in the Inspection, (2) Respondent claims that the Board incorrectly relies on its presumption that prior serious safety violations were enforced by Respondent solely with verbal reprimands, and (3) the Board's narrow focus on Okamura's history of prior disciplinary actions and the Board's position that verbal warnings for safety violations are not adequate are both contrary to prior established case law.

---

[8] See, Exhibit 1 at page 100.

Regarding the first issue in Respondent's Exceptions, the Board has given great consideration to Respondent's challenge to Clark's credibility. Respondent questions the Board's acceptance of Clark's testimony that Okamura "admitted" to him in the Inspection that Okamura only issued verbal warnings when he discovered serious violations of safety rules because he had a good relationship with his workers and he believed that verbal warnings were sufficient to correct any type of work safety violation. Respondent also questions the Board's rejection of Okamura's testimony denying that it was his and Respondent's policy to only give verbal warnings for serious infractions prior to March 5, 2009.

At the evidentiary hearing, Okamura denied making this admission to Clark and Respondent argues in Respondent's Exceptions that Okamura is more credible than Clark and that the Board should accept Okamura's testimony over Clark's.

In the Director's Opposition to Respondent's Exceptions, the credibility of Clark and his Inspection are supported with specific references to his testimony and Inspection. The Board, after reviewing the points raised in the Director's Opposition to Respondent's Exceptions and giving further consideration to the arguments raised by Respondent, still finds the testimony of Clark to be more credible than the testimony of Okamura on the issue of his admission for the following reasons:

1. Okamura's records shows no written reprimand for any serious safety violation prior to the March 5, 2009 Citation. It is not believable that there was no violation witnessed by Okamura prior to March 5, 2009, especially since he was the Big Island superintendent for Respondent for about two years prior to March 2009, and before then he was a foreman, which also have the authority to write-up their crew,[9] since 1995.[10]
2. Okamura testified that he "consistently" issued written warnings for serious safety violations, but Respondent failed to present any evidence of Okamura issuing written reprimands for such violations prior to the March 5, 2009 violation. Interestingly, Respondent provided written reprimands from other superintendents of Respondent for pre-March 5, 2009 violations, but none was provided for Okamura.
3. Regarding Okamura's admission that he only issued verbal warnings when he discovered serious violations of safety rules because he had a good relationship with his workers and he believed that verbal warnings were sufficient to correct any type of work safety violation, Okamura denied making this statement to Clark and said that

[9] Based on the testimonies of Okamura (at page 76 of Transcript) and Myles Hokama (at page 111 of Transcript), Respondent's safety coordinator.
[10] See Transcript at pages 68 and 85.

this was a "misunderstanding" with Clark. However, Okamura was not able to explain what the misunderstanding was based on.[11]

4. Only after the Citation for the March 5, 2009 violations is there any evidence of written reprimands issued by Okamura.
5. Okamura failed to issue a written reprimand to Yam, the crew foreman who had the responsibility to supervise the crew while Okamura was absent from the Kamuela Work Site, for Yam's failure to properly supervise Taise and Estabillio. Thus, Okamura's claim that he "consistently" issued written warnings for serious safety violations does not even hold true for the case at hand.

Regarding the second issue in Respondent's Exception, Respondent contends that "[i]t would be reversible error for the HLRB to **presume** that serious safety violations were previously only enforced **by Respondent** with verbal reprimands when there was undisputed written evidence of prior serious safety violations being enforced with more than verbal reprimands."[12] Citing Kiewit, Respondent claims that the employer does not have the burden to "disprove" such a presumption and that "[i]t is indisputable that *prima facie* evidence was submitted into evidence by Respondent of Employer's attempt to effectively enforce the rules for the 'discovered' safety violation."[13]

The Board does not make an unsupportable presumption against Okamura or Respondent on this issue. To the contrary, the Board relies on Okamura's admission that he only issued verbal warnings when he discovered serious violations of safety rules. Thus, Respondent's claim that there is no evidence of prior serious safety violations being enforced with more than verbal reprimands is incorrect. Furthermore, the Board finds misleading and factually overstated Respondent's claim that in its handling of the March 5 incident "violating employees were immediately suspended for their misconduct, *not just verbally reprimanded."*[14] While it is true that Respondent immediately suspended Taise and Estabillio, it is also true that Respondent failed to suspend or issue any written reprimand to Yam. The issuance of a verbal reprimand of Yam without any written reprimand or suspension is a clear violation of Respondent's written disciplinary policy, thus, there is ample evidence in the record of serious safety violations being enforced **by** Respondent only with verbal reprimands. Yam had the responsibility to watch over the crew members when Okamura was not present and as a result of the Inspection and Citation, Respondent was aware that Yam failed to properly supervise Taise and Estabillio at the Kamuela Work Site on March 5, 2009. Okamura testified at the evidentiary hearing that Yam "got yelled at by me, instead of kicking his ass, but that's about it." Okamura could not explain at the evidentiary hearing why he did not make a written record of this disciplinary action against Yam.

---

[11] See Transcript at page 74.
[12] At page 9 of Respondent's Exceptions.
[13] Id.
[14] At page 4 of Respondent's Exceptions.

Regarding the third issue in Respondent's Exceptions, Respondent argues that the Board's PFFCL regarding the employee misconduct defense is contrary to prior case law established by the Board and in Kiewit. Citing Board Decision No. 22 in Director, Department of Labor and Industrial Relations v. International Roofing & Building Construction, Inc. (Decision 22), which cited and relied upon the case law established in Kiewit, Respondent argues that the Board found that element 4 of the employee misconduct defense was met with "verbal warnings" for violations of fall protection rules for that specific incident, and argues that there is no requirement in either Kiewit or Decision 22 that for element 4 of the employee misconduct defense to be met, there must be evidence that every supervisory employee of Respondent effectively enforced the type of cited safety violation with more than verbal warnings prior to the cited incident.

In arguing its position regarding Decision 22, Respondent fails to take into consideration that the employer in Decision 22 had a different disciplinary policy from Respondent. In Decision 22, the employer's disciplinary policy in effect called for a verbal warning for a first offense while Respondent's written disciplinary policy calls for verbal and written reprimands. Thus, there was no violation of the employer's disciplinary policy in Decision 22 unlike the situation in this case. By violating its own disciplinary policies, Respondent cannot deflect blame to its workers and avail itself of the employee misconduct defense. Also, the Board is aware of Respondent's point that Decision 22 did not require the employer to demonstrate its prior history of disciplining its workers and that discipline for the cited incident was sufficient to establish element 4. However, the Board's ruling on element 4 in Decision 22 is mere *dicta* since the Board found the employee misconduct defense inapplicable in that case because the employer failed to establish elements 2 and 3.

Furthermore, the Board finds that the better approach and policy to follow calls for an examination of the employer's enforcement of its disciplinary rules prior to the cited incident. Clearly an inquiry into Respondent and Okamura's **prior** disciplinary actions for similar violations is relevant and perhaps, more precisely, it is **essential** in determining whether the employer has effectively enforced the rules when violations have been discovered. If the Board's focus is solely limited to the employer's action after a citation issued, the full intent and purpose of Hawaii's Occupational Safety and Health Law would not be met. Section 396-2, **Findings and Purpose**, states in part as follows:

> This legislation is also designed to permit and **encourage employer and employee efforts** to reduce injury and disease arising out of employment and to **stimulate them to institute new programs and to perfect existing programs** for providing safe and healthful working environments. (Emphasis added)

The Board reads the Findings and Purpose section of Hawaii's Occupational Safety and Health Law is intended to encourage employer efforts to comply with worker safety rules before accidents or citations occur. Lastly, the Board finds that there is a current mechanism to encourage employers to immediately comply with work safety practices post-citation which is the "good faith" factor in the calculation of the penalty. The current penalty formula of HIOSH takes into consideration the "good faith" compliance and abatement efforts of the employer post-citation. In this case, if Okamura issued verbal and written reprimands to Taise, Estabillio and Yam, then such an action should be taken into consideration by HIOSH in determining the good faith of Respondent when calculating the penalty. However, the Board does not find it to be good policy to allow the "employee misconduct" defense based on the employer's post-citation compliance.

Of course, if the cited incident was the first violation of the work safety rule involved, then such an inquiry is not necessary. However, in the case at hand, there were many prior incidents involving the violation of the Fall Protection Rules and such an inquiry by the Board is appropriate. Regarding Respondent's claim that the Board's focus on Okamura's prior enforcement record without regard for the enforcement practices of other supervisors is too narrow of an approach and that the Board should consider evidence regarding other supervisory employees of Respondent. However, contrary to Respondent's assertion, the Board has considered the enforcement practices of other supervisors but its primary focus has been on Okamura's prior enforcement record which the Board has found to be poor. Okamura's prior record shows no written reprimands for Fall Protection violations which is believable in light of his statement to Clark that he previously only gave verbal warnings because he had a good relationship with his workers and believed that verbal warnings were sufficient to correct any type of work safety violation. The only evidence of written reprimands issued by Okamura are for incidences that occurred from and after the cited incident on March 5, 2009. Okamura's poor enforcement record is also evident in the cited incident as he failed to issue to Yam a written reprimand. With such a poor work safety enforcement record by Okamura, the Board's review and consideration of the other supervisors' record is unnecessary.

As such, the Board finds that Respondent did not meet the fourth element of the "employee misconduct" affirmative defense.

D. The Penalty of $10,000 Assessed by the Director Is Erroneous.

Since Respondent was not a "repeat" violator for the reasons we articulated in Section III.B. above, the $2,000 base penalty should not have been multiplied by 5. As such, the raw gravity-based penalty should be $2,000.

Also, because Respondent was not a "repeat" offender, Clark should consider whether the Respondent took "good faith" actions to abate the problems involving the enforcement of the Fall Protection Rules and was eligible for a reduction in the raw gravity-bases penalty (which is now $2,000) on this basis. Accordingly, this matter is remanded to the Director and HIOSH for consideration of these issues.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board affirms the Citation 1, Item 1 resulting from HIOSH Inspection Number 311437206 conducted on March 5, 2009, but modifies the characterization of the violation from "repeat serious" to "serious" and the penalty from $10,000 to $2,000 based on the modification of the characterization of the violation; and remands to the Director and HIOSH for consideration of the issues of whether Respondent exercised "good faith" actions to abate the problem based on the Fall Protection Rules after issuance of the Citation, and if so, whether a reduction of the raw-based penalty of $2,000 is warranted on that basis.

Dated: Honolulu, Hawaii, October 15, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD STATE OF HAWAII

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies:

Herbert B.K. Lau, Deputy Attorney General
Scott E. Kubota, Esq.