LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. MARYL PACIFIC CONSTRUCTORS, INC. Respondent.	CASE NO. OSAB 2001-18 OSHCO ID: C4756 Inspection No. 302958400

ORDER ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 13, 2002, the Hawaii Labor Relations Board ("HLRB"), acting as hearing officer for the Labor and Industrial Relations Appeals Board ("Board"), issued a Proposed Findings Of Fact, Conclusions Of Law, And Order ("Proposed Findings, Conclusions, And Order"). Certified copies of the Proposed Findings, Conclusions, And Order were served upon the parties the same day and received shortly thereafter. The parties were afforded ten (10) working days in which to file written exceptions to the Proposed Findings, Conclusions, And Order.

On June 24, 2002, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, filed a request for oral argument on its exceptions to the Proposed Findings, Conclusions, And Order. On June 26, 2002, the Board issued a Notice Of Oral Argument, setting a hearing on Complainant's exceptions for 10:30 a.m. on July 25, 2002, at the Labor Appeals Board.

Having considered the record, IT IS HEREBY ORDERED that the Proposed Decision and Order be adopted in toto.

Dated: Honolulu, Hawaii, JUL 26 2002.

RANDALL Y. IWASE, Chairman

CAROL K. YAMAMOTO, Member

VICENTE F. AQUINO, Member

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on JUL 26 2002.

NOTICE TO EMPLOYER:
You are required to post a copy of this Order Adopting Proposed Findings of Fact, Conclusions of Law, and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

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

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, vs. MARYL PACIFIC CONSTRUCTORS, INC., Respondent.	CASE NO. OSAB 2001-18 OSHCO C4756 INSPECTION NO. 302958400 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board), acting as hearing officer for the Labor and Industrial Relations Appeals Board (LIRAB), pursuant to a written notice of contest from a citation and notification of penalty issued against MARYL PACIFIC CONSTRUCTORS, INC. (MARYL or Respondent) by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH) on April 10, 2001.

A hearing on the case was held on January 25, 2002. Having reviewed the record and provided all parties a full and fair opportunity to be heard, the Board proposes the following findings of fact, conclusions of law, and order.

PROPOSED FINDINGS OF FACT

1. On January 23, 2001, Charles Clark (Clark), a HIOSH Safety Compliance Officer inspected the work site of Respondent MARYL, a general contractor engaged in construction at Wailuku Parkside, Wailuku, Hawaii 96793.

2. On April 10, 2001, the Director issued MARYL a Citation and Notification of Penalty (Citation), which MARYL contested by letter dated April 30, 2001.

3. On January 25, 2002, Board held a hearing on MARYL's Contest to address the following issues:

Whether MARYL violated standard § 12-110-2(f)(1)(A) as described in Citation 1, Item 1.

a. If so, is the characterization of the violation as "serious" appropriate? If not, what is the appropriate characterization?

b. If so, was the imposition and amount of the proposed $700.00 penalty appropriate?

c. Whether any such violation is negated by the affirmative defenses of reasonableness, due diligence or employee misconduct?

4. MARYL was the general contractor for the Wailuku Parkside Project, a 20-acre site for 120 single-family residential homes. These were one or two-story homes, all with the lowest part of their roofs eight feet off the ground.

5. As the project's general contractor, MARYL hired all subcontractors, including Preston Roofing (Preston) and Bluewater Construction (Bluewater).

6. MARYL had overall responsibility for safety at the project including safety training for its subcontractors. MARYL could set schedules, construction sequencing, and impose safety requirements. MARYL could also force subcontractors to comply with its safety procedures by stopping work and correcting or having its subcontractors correct unsafe conditions. If necessary, MARYL could discipline any subcontractor engaged in repeated violations. According to MARYL's Superintendent Eric Biely (Biely), if things got really bad, MARYL could also fire a subcontractor's employees.

7. Biely was in charge of the project's day-to-day activities and did training at the site. As MARYL's top person, Biely was responsible for making sure its subcontractors worked safely. In this regard, it was important for him to have a general understanding about safety and health requirements under HIOSH's standards. Biely had a copy of HIOSH's standards at the site, including its fall protection standards.

Tanaka's Consult

8. From June 22, 2000 through July 25, 2000 Dawn Tanaka (Tanaka), an employee with HIOSH's Consultation and Training Branch, performed an "on-site" consultation with MARYL. Tanaka had previously worked for HIOSH

as a safety compliance officer before moving to its Consulation and Training Branch. HIOSH used consultations to help employers develop safety and health programs, identify problems, and understand safety and health standards through training materials and handouts given to employers.

9. The consultation was performed at MARYL's request. Biely had initiated the consultation because he wanted to be certain that subcontractors, including Preston and Bluewater, were in compliance with safety standards.

10. Tanaka's consult with MARYL covered its safety and health program, hazard communication, fall protection, electrical and scaffolding concerns, and safety monitor requirements. Tanaka's consult included two on-site surveys: one during an initial consult and another during a follow-up consult. Each lasted about an hour. The consultations coincided with subcontractor safety meetings called by MARYL.

11. During the consult period, Tanaka saw an employee at MARYL's site working alone on a roof nailing shingles without fall protection. Tanaka saw this on a Sunday while driving past the site from her home down the street.

12. Tanaka told Biely about the incident and advised him that roofing and sheathing work would be subject to HIOSH's safety monitor requirements. She also gave him a copy of HIOSH's residential fall protection guidelines, which included its fall protection standards.[1] MARYL acknowledged receiving residential fall protection guidelines from HIOSH.

13. Tanaka finished her consult with MARYL on July 25, 2000. As part of her consult, Tanaka also prepared a written report, which HIOSH sent to MARYL by letter dated August 11, 2000. Tanaka's report was not sent to or shared with HIOSH's enforcement branch.

14. At some point, Tanaka also reviewed Bluewater's fall protection plan,[2] although her consult was with MARYL, not Bluewater.[3] Tanaka reviewed the

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[1]Tanaka said she gave Biely several copies of a document entitled, "A Guideline for Fall Protection Residential Roofing Operations State of Hawai'i," which included a copy of the fall protection standards. Biely acknowledged receiving "handout material," including handouts on fall protection, but could not recall receiving the Guideline.

[2]HIOSH's standards allow employers to use fall protection plans in lieu of conventional fall protection in certain instances if specific requirements are met.

[3]It appears Tanaka reviewed Bluewater's fall protection plan after her consult had already ended on July 25, 2000. This is based on an August 30, 2000 fax memorandum MARYL wrote to Bluewater requesting its fall protection plan.

plan for major components but did not read it line-by-line because it was a standard plan prepared by Christopher Norris, an independent safety consultant Bluewater had hired. Tanaka informed MARYL the plan was not site specific and lacked a training record. Accordingly, Tanaka directed MARYL to have Bluewater amend the plan's cover page to identify the site and to append a list of trained employees.

15. Tanaka noted MARYL was cooperative but had trouble with abatement and seemed to have problems "pulling it all together." Tanaka also noted Bluewater had not conducted training for all employees. MARYL, however, eventually abated all hazards identified by Tanaka's consult.

16. At trial, Biely said he found Tanaka's consult "very helpful" and thought "[she] did a pretty good job overall."

Clark's Inspection

17. On June 23, 2001, Clark went to MARYL's work site to inspect a company named Kela Corporation (Kela). Clark met Biely and told him the inspection was for Kela but would expand to include MARYL and any on-site subcontractors if he saw any serious violations.

18. Biely drove Clark to Kela's work area where Clark immediately saw two Preston employees working on a roof eight feet or higher without fall protection or a safety monitor. Clark photographed what he saw and asked Biely who was in charge. Director's Trial Exhibits 2 and 3. Biely said one of the two employees was a foreman. Clark asked the foreman to come down from the roof and asked what type of fall protection they were using. The foreman said they were using a safety monitor, whom he identified as himself. When Clark asked the foreman why he wasn't watching the other employee, the foreman "sort of chuckled and laughed." Before Clark's inspection, the employees never used any kind of conventional fall protection[4] such as self-restraining systems, harnesses or lanyards. When asked to review Clark's photo of the two Preston employees, Biely confirmed neither employee appeared to be acting as a monitor.

[4]"Conventional fall protection" generally refers to standard types of fall protection such as guardrail systems, safety net systems, and personal fall arrest systems. See, e.g., 29 CFR §1926.501(b)(2).

19. At another part of MARYL's work site, Clark saw and photographed two Bluewater employees erecting roof trusses without fall protection.[5] Both were eight feet or more above a concrete slab.

20. Biely showed Clark a copy of a fall protection plan, allegedly used by Bluewater in place of having its employees wear conventional fall protection. Bluewater's plan, however, did not identify the two employees as those authorized to work under the plan in controlled access zones.[6] Similarly, the employees were not identified on other documents allegedly relating to Bluewater's fall protection plan.

21. Clark spoke with Bluewater's foreman, Biggie Lara (Lara), who identified the two Bluewater employees as Steven Dias, Jr. (Dias, Jr.) and Steven Dias, Sr. (Dias, Sr.). Lara was in charge of both employees, but said he knew nothing of Bluewater's fall protection plan or what it was.

22. Biely knew Bluewater's fall protection plan contained alternative safety procedures for employees to use in place of conventional fall protection. He knew employees had to be trained on the alternative procedures and named as part of Bluewater's fall protection plan. Employees listed in Bluewater's plan would be those who received proper training on the alternative measures. This was how MARYL identified who was properly trained and allowed to work on the different activities in the fall protection plan. Biely told Bluewater it had to keep updating its list of employees that could work under its plan. The updated list of names was something MARYL wanted and required.

23. Biely, however did not know and was unsure if MARYL ever produced documentation showing the two Bluewater employees seen by Clark were covered by its fall protection plan. Biely was also surprised the two employees were not identified in Bluewater's plan. Biely, however, had no explanation. In fact, Biely could not positively say whether a document entitled "Appendix A" was part of Bluewater's fall protection plan.

Clark's Discussions With Tanaka

24. During his inspection, Clark questioned whether Preston could use a safety monitor given the pitch (slope) of the roof its employees were on. Clark told

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[5]The employees did not have a safety monitor, which Biely acknowledged was only used for roof shingling, not roof truss work. Biely Deposition p. 27.

[6]Controlled access zone means "an area in which certain work (e.g., overhand bricklaying) may take place without the use of guardrail systems, personal fall arrest systems, or safety net systems and access to the zone is controlled." 29 CFR §1926.500(b).

Biely safety monitors alone could only be used on low sloped roofs having a 4:12 pitch or less. Biely claimed, however, that Tanaka said they could use a safety monitor on the roofs under construction with no reference to pitch.

25. In light of Biely's claim, Clark was directed by HIOSH administration to contact Tanaka to explore what was said. Contrary to Biely's claim, Tanaka told Clark she okayed the use of a safety monitor because Biely told her the roofs had a 4:12 pitch.

26. From talking to Tanaka, Clark learned she had mistakenly assumed roofing work included roof sheathing operations. Clark also believed MARYL had not been sufficiently apprised that safety monitors could not be used on roofs exceeding a 4:12 pitch.

27. In a memorandum to HIOSH administration,[7] Clark summarized his conclusions regarding Tanaka's consultation with respect to fall protection:

> There seems to be confusion over the use of fall protection. The general and subs were under the impression that a safety monitor could substitute for fall protection in roofing work no matter what the pitch, and a CAZ was all they needed to do to get away from using fall protection while installing roof sheathing. ... In my opinion the consultant did not communicate the fall protection standards to the employers. Let me know what you want me to do ASAP. Cite um or educate them. (Emphasis added.)

28. Clark affirmed these representations at trial. (Transcript of hearing held on January 25, 2002 (Tr.), p. 157.) The confusion regarding standards, and impression that only safety monitors were required for roof work was also testified to by Biely. Accordingly, they are adopted as findings of fact.

29. HIOSH administration responded to Clark's "Cite um or educate them" inquiry by leaving the decision to Clark and Tanaka. Clark and Tanaka met and Tanaka concluded the meeting by advising that Clark go ahead and issue the citations.

30. Tanaka's recommendation was allegedly based in part upon her belief that Biely misrepresented the roofs' pitch to her. She testified that during

[7]Complainant Director, Department of labor and Industrial Relations', First Supplemental Response to Respondent Maryl Pacific Constructors, Inc.'s, First Request for Production of Documents and Letter of November 27, 2001, p. 172.

consultation she asked Biely about the roofs' pitch. Tanaka testified that Biely answered 4:12. Based on this representation, Tanaka advised Biely that only safety monitors would be required to ensure compliance during roofing work.

31. Biely testified that Tanaka made no inquiry regarding pitch and simply advised that safety monitors would suffice. Clark further testified that based on his inspection, he did not believe that Biely had any understanding that conventional fall protection was required for roofs with pitches in excess of 4:12. The testimony of Biely and Clark are adopted in this regard based upon Clark's credibility, the consistency of the representation with his memorandum, see Finding of Fact # 27 above, and the absence of any motive to misrepresent.

Maryl's Citation

32. HIOSH cited MARYL for violating Hawaii Administrative Rules (HAR) § 12-110-2(f)(1)(A) by failing to ensure that Preston and Bluewater complied with HIOSH's construction standards.

33. HIOSH originally based MARYL's citation on three violations. The citation was later amended to incorporate only the Preston and Bluewater violations. HIOSH also cited Preston and Bluewater for the same conditions. Preston and Bluewater did not contest the citations.

34. HIOSH cited MARYL based, in part, on Preston's failure to comply with 29 CFR 1926.501(b)(11), which provides as follows:

> Steep roofs. Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

HAR Chapter 121.2, 29 CFR 1926.501(b)(11).

35. "Steep roofs" are those which have slopes in excess of 4:12. 29 CFR 1926.501(b)(10). Thus because Preston's roofers were working without conventional fall protection on roofs with slopes in excess of 4:12, Preston, and MARYL as the general contractor, were cited.

36. HIOSH also cited MARYL based, in part, on Bluewater's failure to comply with 29 CFR 1926.502(k)(9), which provides as follows:

> The fall protection plan must include a statement which provides the name or other method of identification for each employee who is designated to work in controlled access zones. No other employees may enter controlled access zones.

HAR Chapter 121.2, 29 CFR 1926.502(k)(9).

37. Bluewater is alleged to have violated the standard by letting two employees erect roof trusses in a controlled access zone without identifying them as employees designated to work in such zones.[8] The two employees were Dias, Jr. and Dias, Sr. HIOSH cited Bluewater for violating 29 CFR 1926.502(k)(9) as well as other standards which Bluewater did not contest.

38. HIOSH thus cited MARYL for not ensuring Bluewater identified employees trained and authorized to work in controlled access zones as required by 29 CFR 1926.502(k)(9).

PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest.

2. To establish a violation of a standard, the Director must prove: "(1) the 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."

Preston Violation

3. The Board concludes that the Director has not carried his burden with respect to MARYL's knowledge of the violative condition.

4. The Board cannot conclude that MARYL knew or should have known that the failure to utilize conventional fall protection on the steep roofs at the site constituted a violative condition. This is because they were expressly advised by Tanaka that conventional fall protection would not be required on roofing work. Biely testified that MARYL relied on Tanaka's representations. Clark confirmed that MARYL could rely upon the safety consultant's representations

[8]Bluewater is also alleged to have failed to identify the area as a controlled access zone. However, at trial, Clark testified that the citations were based upon the failure to identify the Dias' in the fall protection plan. Clark's representation is accepted and accordingly determination will proceed only on the issue of the listing of the Dias'.

(Tr. p. 156) and acknowledged that Tanaka did not properly communicate the fall protection standards to MARYL in a few areas (Tr. p. 158).

5. In Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Com'n, 528 F.2d 645, 649 (5th Cir. 1976), the Fifth Circuit Court of Appeals advised that in interpreting an OSHA regulation:

> An employer... is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

6. Based on the record, MARYL exercised diligence in soliciting HIOSH's advice, relied upon the express representations of HIOSH's safety consultant and therefore did not have fair warning of the prohibited conduct and safety requirements of the applicable standard. Thus, per Diamond Roofing, supra, there was no reasonably clear standard of culpability established. The Board concludes that the Director failed to carry its burden in proving a violation of the applicable standard.

7. The Director argues that even if MARYL relied upon Tanaka's direction in foregoing conventional fall protection, MARYL nonetheless deserves a citation because Tanaka at least expressly required the use of safety monitors during roofing and the safety monitoring system used by MARYL was grossly inadequate. Evidence adduced at trial indeed supports a conclusion that the safety monitoring system used by MARYL and Biely's understanding of safety monitoring requirements, were grossly inadequate.[9] See, 29 CFR §1926.502(h).

8. Proof of any such failings is not, however, sufficient to sustain the citation against MARYL. It has not been established that the safety monitoring standard applies to either Preston or MARYL. In fact, the Director's decision

[9]Although the Board concludes that these inadequacies have no bearing on the affirmation of the MARYL citation, the employer is admonished to learn and implement appropriate procedures if, or when, safety monitors are utilized. Biely's testimony regarding monitoring requirements was, in fact, astonishing in its ignorance. It is understandable that the Director might reasonably believe that such gross deviation from regulatory requirements justify some sort of sanction.

to cite them under the steep slope standard, which requires conventional fall protection rather than safety monitors, suggests that the standard is inapplicable to the cited circumstance. More significantly, neither the MARYL nor Preston citations alleged any violation of the safety monitoring standard.[10] Its violation therefore can have no bearing on the question of whether Preston violated, and MARYL failed to address the violation of the steep roof fall protection standard. Based upon the citation, this is the only issue before the Board.

Bluewater Violation

9. The Board similarly concludes that the Director has not carried its burden to prove that Bluewater knew or should have known of the failure to include the names of Dias Jr. and Dias Sr. as among those trained in the requirements of Bluewater's fall protection plan.

10. Actual knowledge of a violative condition is not required to establish a violation. Knowledge is presumed where an employer knows or should have known of a violative condition with the exercise of reasonable diligence. Director v. Honolulu Shirt Shop, OSAB 93-073 at 8 (Jan. 31, 1996); see also Director v. Charles Pankow Builders, Ltd., OSAB 91-015 (Jan. 28, 1992) (employer could have known of the violation with the exercise of reasonable diligence); MCC of Florida, Inc., 1981 OSHC § 25,420 (constructive knowledge demonstrated where violation detectable through exercise of reasonable diligence). Indeed, "[a]n employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative conditions." N & N Contractors, Inc. v. Occupational Safety & Health Review Com'n., 255 F.3d 122, 127 (4th Cir. 2001). "Factors relevant in the reasonable diligence inquiry include the duty to inspect the work area and anticipate hazards, the duty to adequately supervise employees, and the duty to implement a proper training program and work rules." Id.

11. There is no evidence to support a conclusion that MARYL had actual knowledge of the absence of the Dias' names on the list of employees trained under the Bluewater fall protection plan. Accordingly in order to affirm the citation the Board must find either constructive knowledge or that MARYL should have known of the violation.

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[10]The example provided in the MARYL citation to support its alleged failure to ensure compliance identified only the absence of fall protection on a 5:12 slope roof: "two employees were installing roofing materials on a roof with a 5/12 pitch and 8 foot fall to the ground below without any type of fall protection." Citation at 6.

12. Applying the standard cited above, constructive knowledge or a conclusion that MARYL should have known of the violative condition will be found if MARYL failed to use "reasonable diligence."

13. The Board concludes that MARYL exercised reasonable diligence in supervising the development and maintenance of Bluewater's fall protection plan. Evidence of reasonable diligence is MARYL's initiation of the HIOSH consult with an emphasis on fall protection requirements; the inclusion of subcontractors, including Bluewater, in the safety meetings at which Tanaka provided instruction; the development of Bluewater's fall protection plan by a private safety consultant; the review of Bluewater's fall protection plan by Tanaka, and the receipt of, and compliance with, Tanaka's instruction that a list of trained employees be appended to the plan.

14. Further (1) Biely knew employees who were trained had to be listed in Bluewater's fall protection plan; (2) Biely testified listing employees was a way to identify who was properly trained and allowed to work on different activities listed in Bluewater's fall protection plan; (3) Biely told Bluewater it had to keep updating its list of employees; and (4) the updated list was something MARYL required.

15. The Director argues that notwithstanding the above, reasonable diligence cannot be found because MARYL failed to show that it enforced its program with respect to Bluewater's fall protection plan.

16. Enforcement is indeed relevant to, if not determinative of, a finding of reasonable diligence. However, it is not the employer's burden to prove enforcement. Rather, as with all elements of a citation, it is the Director's burden to prove a lack of adequate enforcement. In the instant case, such proof consists principally of the absence of the Dias' names on the training record. To accept this as dispositive, however, would impose constructive knowledge upon all employers or general contractors as proof of a violative condition would in all cases serve as proof of lack of enforcement. This would reduce the inquiry regarding knowledge into a nullity – an absurd and unacceptable result.

17. If it had been proved that MARYL simply ignored all enforcement, or failed to initiate a system of enforcement, or acted in a manner which undermined compliance with its instructions, an absence of reasonable diligence might be found. But no such circumstance is presented in the instant case and the weight of the evidence is clearly in favor of a finding of reasonable diligence.

18. Consequently knowledge of the violative condition cannot be imputed to MARYL and the citation with respect to the alleged Bluewater violation cannot be affirmed.

19. Having concluded that MARYL had neither actual nor constructive knowledge of the violative conditions alleged in the Bluewater and Preston violations, the Board proposes that the instant citation be vacated.

PROPOSED ORDER

Citation 1, Item 1 for violation of Standard § 12-110-2(f)(1)(A) is vacated. The characterization of "serious" and proposed $700.00 penalty are also vacated.

DATED: Honolulu, Hawaii, June 13, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with LIRAB, pursuant to HRS § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by LIRAB in its discretion. In such event, the parties will be so notified.

Copies sent to:

Brian G.S. Choy, Esq.
J. Gerard Lam, Deputy Attorney General