STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and IES RESIDENTIAL, INC., Respondent.	CASE NO. OSH 2013-08 DECISION NO. 31 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 finds in favor of Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR). The Board members thoroughly reviewed all the evidence and arguments presented,[1] and the Board issues these findings of fact, conclusions of law, and decision and order.

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 the Director's Response, 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.

[1] While Board Chair Komatsubara did not participate in the hearing in this matter, he has reviewed the entire record, including the pleadings, the tape recordings of the evidentiary hearing and exhibits filed in this case.

I. PROCEDURAL HISTORY

On April 23, 2013, the Board received from the Director a Notice of Contest regarding the Citation issued to Respondent IES RESIDENTIAL, INC. (Respondent), on April 3, 2013, and resulting from Inspection Number 316268127 which was conducted on December 14, 2012 (Inspection), by the Director's Occupational Safety and Health Division (HIOSH). The Director cited a "serious" violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] and assessed a proposed penalty of $825.00. Respondent contested the Citation by letter to HIOSH on April 8, 2013.

An initial conference/settlement conference was held on July 8, 2013, and a December 5, 2013 trial date was scheduled.

On December 5 and 12, 2013, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board. Following the evidentiary hearing, the Director and Respondent submitted post-hearing memoranda supporting their respective positions on February 5, 2014.

By Order No. 721, the Board issued its Proposed Findings of Fact, Conclusions of Law, and Decision and Order on November 25, 2015 (PFFCL) in accordance with Hawaii Revised Statutes (HRS) § 91-11[2]. On December 7, 2015, the Director filed its Response to Order No. 721, Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Director's Response). Respondent did not file any objection or comment regarding the Director's Response.

On December 7, 2015, Respondent filed its Exceptions to Proposed Findings of Fact, Conclusions of Law and Decision and Order (Respondent's Exceptions). The Director filed on December 17, 2015, its Opposition to Respondent's Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Director's Opposition to Respondent's Exceptions).

On January 11, 2016, the Board conducted a hearing on Director's Response and Respondent's Exceptions, and arguments from the parties were presented and received by the Board.

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[2] 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[.]

On January 12, 2016, the Board received from Respondent a compact disc containing extracts from the Board's recording of the December 5 and 12, 2013 evidentiary hearing, including testimony of witness Chris Woytus regarding site inspections from July through December 13, 2013, and testimony of witness Dan Marsh regarding his jobsite safety inspections from early December 2012 to June 11, 2013. In addition to the compact disc, Respondent enclosed copies of cases referenced by Respondent during argument at the January 11, 2016 hearing.

II. FINDINGS OF FACT

A. The Inspection.

Respondent is an electrical, cable, and solar installation contractor with work experience in at least 20 different states. Its Hawaii operations, which are limited to the installation of solar photovoltaic (pv) systems, began in July of 2012.

On December 14, 2012, HIOSH compliance officers Timothy Scalzone (Scalzone) and Clayton Chun (Chun) were engaged in a "sweep watch" in the Kapalama area, looking for fall protection violations. This "sweep watch" was part of a fall protection emphasis program (FPEP) which Scalzone testified was necessary because falls are a leading cause of serious injury and death on construction sites. He also testified that the failure to use fall protection is one of the most common violations for workers working six feet or more above the ground.

At approximately 2:30 p.m. that day, Scalzone and Chun observed four men installing pv panels on the sloped roof of a two-story residential house located at 962 Alewa Drive, Honolulu, Hawaii (Alewa Work Site). Scalzone observed that three of the men were wearing harnesses but were not tied-off to any lanyard or lifeline. The fourth worker was not wearing any harness. There were no guardrails or safety net systems installed along the roof edge, and there was no safety monitoring system in place. Scalzone and Chun took photographs of the activity, and these photographs were entered into evidence at the evidentiary hearing. (See, Exhibit 1, pages 38 – 46.)

Scalzone and Chun called the men down from the roof and presented their credentials to the four men. The four men were Joshua "Aiwa" Like (Like), Nicholas "Nainoa" Kam (Kam), Christian Bernard (Bernard), and Peter Lee (Lee), the project lead man/electrician. All four men confirmed that they worked for Respondent at the Alewa Work Site. Scalzone conducted a walk-around inspection of the Alewa Work Site and conferenced with Lee who acknowledged to Scalzone that the men should have been tied-off while on the roof. The Citation alleged that the four men were on the roof without fall protection and were about 18 feet above the ground and a concrete driveway.

As a part of the Investigation, Scalzone learned of Respondent's fall protection program and disciplinary policy (Fall Protection Policy) which states in part as follows:

POLICY

It is the policy of IESR1 and all sub-contractors to take all practical measures possible to prevent employees from being injured by falls. We will take necessary steps to eliminate, prevent and control fall hazards. We will comply fully with the OSHA Fall Protection standard (29 CFR 1926, Subpart M, Fall Protection). The first Priority is given to the elimination of fall hazards. If a fall hazard cannot be eliminated, effective fall protection will be planned, implemented and monitored to control the risks of injury due to falling. All employees exposed to potential falls from heights will be trained to minimize the exposures. Fall protection equipment will be provided and its use required by all employees. Foreman will be responsible for implementation of a fall protection plan for their jobsite.

* * *

VIOLATION:

Working outside the warning area without an appropriate fall protection device for any length of time will result in immediate suspension or termination of employment.

See, Exhibit 1 at pages 3 and 11 (emphasis in original).

Scalzone met with Dan Marsh (Marsh) and Chris Woytus (Woytus), Respondent's division manager and assistant manager for the Hawaii Division, respectively. Three days later, on December 17, 2012, Marsh conducted follow-up training for all the crew on fall protection as a result of the HIOSH Inspection involving the December 14, 2012 violation at the Alewa Work Site. Testimony at the evidentiary hearing at the Board revealed that Bernard, one of the four employees who were on the roof on December 14, 2012, was "missing" from the follow up training on December 17, 2012. Although Respondent's Fall Protection Policy required immediate suspension or termination, none of the four workers were suspended or terminated. Further, when additional fall protection training was conducted by outreach trainer Jim Johnson for employer in February 2013, two of the four employees involved in the December 14, 2012 incident, Kam and Like, were not present. Testimony at the Board hearing indicates that Kam may have been sick the week of the February 2013 training, but there is no evidence in the record that any attempt was made by Respondent to reschedule post-violation training, referred to as "corrective counseling", of employees Bernard, Kam and Like.

B. Penalties under the Citation.

On April 3, 2013, HIOSH issued the Citation to Respondent, alleging a "serious" violation of 29 CFR 1926.501(b)(13) and a proposed penalty of $825.00 based upon the Inspection.

According to Scalzone, the $825.00 penalty was calculated according to HIOSH's standard policies and procedures to avoid any arbitrary determination by the inspector. The penalty was determined by considering the severity of a resulting injury and the probability of an accident. A severity level of "high" was assessed due to the probable injuries, which are fractures and contusions, and a probability of "lesser" was given due to the lower likelihood of an accident occurring. This resulted in a gravity-based penalty of $2,750.00. The gravity-based penalty was adjusted or reduced in consideration of the size of Respondent's company and its work safety history. Respondent qualified for a 60% discount based on its 13 employees and an additional 10% discount based on its lack of any prior safety citations. Hence, the gravity-based penalty was reduced by 70%, which resulted in the proposed penalty of $825.00. (See, Exhibit 1 at pages 11 and 15.)

C. Respondent's Challenge of the Citation.

Respondent's sole challenge to the Citation is based on the "employee misconduct" defense. In arguing for relief from the Citation through this affirmative defense, Respondent claims that it did everything it could reasonably have done to secure 100% compliance with the company's Fall Protection Policy and that the conduct of Kam, Bernard, Like, and Lee on December 14, 2012 constitutes willful, careless and reckless acts of individuals which should not be imputed to Respondent.

Furthermore, Respondent points out that Scalzone could not recall being trained on the employee misconduct defense, and did not investigate that defense before issuing the Citation.

D. The Director's Response and Respondent's Exceptions.

The Director's Response brought to the Board's attention its error in describing the issues to be determined at trial as to "[w]hether Director's characterization of the subject notice of violation as 'repeat serious' is correct." (*See,* sub-paragraph B.) The Board's analyses of the issues presented at trial and discussion of the applicable facts as applied to the applicable law were based on the Director's characterization of the subject notice of violation as "serious" and not as "repeat serious." Thus, the error in describing the characterization of the violation does not impact the substance of the Board's decision in the PFFCL. The error in description has been corrected in this Findings of Fact, Conclusions of Law and Decision and Order.

Respondent's Exceptions are solely focused on the PFFCL regarding the employee misconduct defense raised by Respondent. Respondent claims that the conclusions reached by the Board in the PFFCL are in error and should be reversed because: (a) the Director applied the wrong standard to the employee misconduct defense; (b) the Director committed a clearly erroneous error that Respondent failed to prove the employee misconduct defense in view of the reliable, probative

and substantial evidence on the whole record ; (c) even under the heightened "Kiewit" standard, Lee's conduct was unpreventable; and (d) the $825 penalty is incorrect and should be reversed.

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:
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> * * *
>
> (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:

A. Whether Respondent 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 "serious" is correct;

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

D. Whether the penalty of $825.00 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) (Permasteelissa).

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 by 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 residential construction was being performed by Respondent at the Alewa Work Site on December 14, 2012, the four men working on the roof were about eighteen feet 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.[2] Respondent does not dispute these issues; and

[2] There 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 articulated in 29 CFR § 1926.501(b)(13) .However, 29 C.F.R. § 1926.501(b)(13) contains an

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 there was no fall protection system at the Alewa Work Site on December 14, 2012. There was no personal fall arrest system, guardrail, or safety net system being utilized by the four men when Scalzone observed them on that day. The roof that the four men were working on was eighteen feet above the ground.

Respondent also does not dispute that Kam, Bernard, Like, and Lee violated not only the cited standard, but also Respondent's own fall protection rules. Lee, the project "lead" at the Alewa Work Site, admitted to Salzone that the four men should have been tied-off while working on the roof that day. Therefore, the Board finds that the Director has met its burden of proving by a preponderance of the evidence that there was a failure to comply with the standard cited in the Citation.

3. An employee had access to the violative condition.

All four men at the Alewa Work Site were working on the roof, which was approximately 18 feet above the ground, and any fall off of the roof by the men would likely have caused them to sustain fractures and contusions. Credible evidence was submitted at the evidentiary hearing that three of men at the Alewa Work Site were on the roof unconnected to any personal fall arrest system, and the fourth worker had no personal fall system at all. Accordingly, all of the four men were exposed to a fall hazard. Respondent does not dispute these issues, and therefore, the Board finds that the Director has met its burden of proving by a preponderance of the evidence that the four men had access to the violative condition.

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

Lee, the project "lead" at the Alewa Work Site, admitted to Salzone that the four men should have been tied-off. This Board has applied the well-settled federal OSHA precedent[3] that

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exception that when the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer is required to develop and implement a fall protection plan meeting the requirements of 29 C.F.R. § 1926.502(k). Respondent does not claim to have developed and implemented a fall protection plan other than those set forth in 29 CFR § 1926.501(b)(13).

[3] The Hawaii Supreme Court has held that where the State structure is modeled after the federal Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 *et. seq.*, we look "to the interpretation of analogous federal laws by the

the actual knowledge of a supervisory or management person can be imputed to the employer. Director v. Dorvin D. Leis Co., Inc., Board Case No. OSH 2013-28, Order No. 582 (2014) (*citing* A.P. O'Horo Company, Inc., 14 BNA OSHC 2004, 2007 (No. 85-369 1991) (A.P. O'Horo); Dover Elevator Company, Inc., 16 BNA OSHC 1281 (No. 91-862 1993). In addition, all four men on the roof on December 14, 2012 (Kam, Bernard, Like and Lee) admitted to Woytus that they knew they were violating Respondent's Fall Protection Policy, which included a 100% tie-off rule applicable to the conditions (18 feet above the ground) at the Alewa Work Site. It is clear that Respondent and its workers knew of the dangers of working on a roof that was 18 feet above the ground.

Thus, 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 "Serious" Is Correct.

Section 396-3, HRS, defines "serious violation" as "a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation."

Two elements are required under the statute for the imposition of a serious characterization: 1) a substantial probability of death or serious physical harm from the existence of the violative condition; and 2) employer knowledge of the violative condition.

In this case it cannot be disputed that a worker would likely suffer a fracture or contusions if he had fallenl eighteen feet to the concrete driveway below. A fracture constitutes serious physical harm. This interpretation of a "serious" characterization of a violation under HRS 396 is supported by the Appeals Board[4] case law. In Director v. Horita Construction, Inc., OSAB 95-027 (198), the Appeals Board found that falls from heights of eight feet, or five feet to the dirt ground below could cause serious injuries such as fractures. In Director v. Buck Roofing Company, Inc., OSAB 95-069 (1998), the Appeals Board found that serious injury would result from falls off residential roofs six feet or more to a lower level.

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federal courts for guidance." Permasteelissa, 125 Hawaii at 228, 257 P.3d at 241 (*citing* French, 105 Hawaii at 467, 99 P.3d at 1051.)

[4] Prior to 2002, the "Appeals board," was defined in HRS § 396-3 as the labor and industrial relations appeals board.

Based upon the evidence in this case, it cannot be disputed that serious injury would likely result if a worker fell eighteen feet to the concrete driveway below.

Throughout this case, Respondent has not challenged the Director's characterization of the violation as being "serious" since it is not disputed that the roof on which the four men were working on was about eighteen feet above the ground, and that they all faced a substantial probability of death or serious physical harm from the existence of the violative condition. As such, the Board finds and concludes that the Director's finding that the characterization of Respondent's violation as being "serious" is correct.

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

In the Kiewit Decision, the Appeals Board adopted the affirmative defense of "employee misconduct." The Appeals 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. Kiewit Decision, at *8 (citing Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶ 23, 664 (1979)).

Further, "When the misconduct is committed by a supervisory employee, the employer must also show that it took all feasible steps to prevent the unsafe activity, including adequate instruction and supervision. Archer-Western Contractors, Ltd. v. Gilbert Corp of Delaware, 15 BNA OSHC 1013, 1017 (1991) (*citing* Daniel International Co. v. OSHRC, 683 F.2d 361, 364 (11th Cir. 1982); Daniel Construction Co., 10 BNA OSHC 1549, 1552, 1982 CCH OSHD P26, 027 at pp. 32,672 (No. 16265, 1982)), *aff'd without published opinion*, 978 F.2d 744, 298 U.S. App. D.C. 247 (D.C. Cir. 1992). 'Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.'" *Id.*; Daisy Constr. Co. v. Sec'y of Labor, 527 Fed.Appx. 1, 2 (D.C. Cir. 2013).

After receiving the evidence at the evidentiary hearing, including the testimonies of witnesses from both sides, the Board finds and concludes that Respondent has not met its burden to establish the necessary elements of the "employee misconduct" defense. Our analysis is as follows:

1. Element 1, the adequacy of Respondent's Fall Protection Policy.

The Fall Protection Policy is a clear and unambiguous statement of Respondent's safety rules regarding working conditions on rooftops. Scalzone testified at the evidentiary hearing that the written policy was "very good," however, HIOSH criticizes the Fall Protection Policy because it fails to "articulate the specific safety duties of the leadman at the site, other than the general statement that the '[f]oreman will be responsible for implementation of a fall protection plan for their jobsite' and '[t]he foreman will evaluate each situation or work procedure where employees may be exposed to a fall of 6 feet or more." (See, Post-Hearing Memorandum of the Director of the Department of Labor and Industrial Relations at pages 23 and 24, *citing* Exhibit 2 at page 180.) Specifically, HIOSH points out that the Fall Protection Policy does not detail the foreman's responsibility to monitor his crew for safety compliance. Id. at 24.)

Although the Fall Protection Policy could be strengthened with language regarding the foreman's specific duties to monitor his crew for safety compliance, the Board finds that the Fall Protection Policy is sufficient to pass the test for Element 1. Questions whether Respondent properly enforced its Fall Protection Policy are discussed below.

2. Element 2, the adequacy of Respondent's communication of its Fall Protection Policy to its workers.

Respondent expended much time, money, and energy to educate its field workers about Respondent's Fall Protection Policy which was specifically tailored for Hawaii and was regularly updated. Respondent's training of each new worker on the use of their personal fall protection equipment at the time of hire, and Respondent's formal group training session on fall protection and use of all arrest equipment, were impressive.

The deficiency in Respondent's program, however, seems to be its communication to its middle-management of the need to monitor, inspect, and continuously enforce the requirements of the Fall Protection Policy. This issue is further discussed in Element 3 below. However, for the purposes of the test in Element 2, the Board finds that Respondent has met the requirements of Element 2 of the "employee misconduct" defense.

3. Element 3, the adequacy of Respondent's action to detect and correct violations of its Fall Protection Policy.

The Board finds that Respondent failed to meet the requirement in Element 3 because of its failure to conduct adequate field inspections of the work being performed by its workers. While the testimony presented by Johnson, Woytus, and Marsh all described field inspection work performed after December 14, 2012, there is no clear evidence of a systematic field inspection

program in effect prior to December 14, 2012, the date of the violations discovered by HIOSH at the Alewa Work Site. It is apparent that Respondent's realization of the need to perform frequent on-site inspections came after the occurrence on December 14, 2012 at the Alewa Work Site.

For example, Woytus testified at the evidentiary hearing that he started Respondent's Hawaii operations in May of 2012. Woytus testified that he conducted nearly daily "surprise" site inspections for safety compliance from December 14, 2012 to the June 2013; however, Woytus did not clearly state in his testimony that he performed nearly daily "surprise" site inspections prior to December 14. Although Marsh claims to have performed "surprise" site inspections for safety compliance from early December 2012, Marsh was never specific as to whether he conducted any of these site inspections prior to December 14, 2012.[5] The Board finds more believable that Marsh's "surprise" inspections probably occurred after December 14 considering that he just move to Hawaii from the mainland in early December 2012 to become Respondent's Hawaii Division Manager. Regarding Johnson, he was hired by Respondent to conduct fall protection training in Hawaii in 2012-2013 and he also assisted Respondent in developing and revising its Fall Protection Policy. Johnson accompanied Allen in conducting three or four field inspections of pv installation jobs performed in Hawaii in February of 2013, but Johnson did not state that he performed any field inspection work of Respondent's pv installation jobs in Hawaii prior to December 14, 2012.

The only person that testified he conducted any field inspection work in Hawaii prior to December 14, 2012 was Allen, Respondent's Vice-President of Safety and Operations who was based in Texas and came to Hawaii to perform work site inspections in June 25-27, 2012, in August 13-15, 2012, and again in November 27-28, 2012. Allen admits that the June inspections did not involve any actual roof work being performed and these inspections were of job sites before the work commenced. Regarding the August inspection, Allen testified that he inspected all of Respondent's Hawaii work sites, looking for safety violations, and found none. Regarding the November inspection, Allen testified that he again conducted work site inspections and observed no safety violations. Nevertheless, Allen's work site inspections, three in six months were clearly infrequent events.

4. Element 4, the enforcement of Respondent's Fall Protection Policy.

The Board finds that Respondent failed to enforce its Fall Protection Policy for fall protection violations that occurred on December 14, 2012. There is no dispute that the Fall Protection Policy was violated, but Respondent nevertheless chose not to enforce the disciplinary aspects of the policy, and Kam, Bernard, Like, and Lee were all retained by Respondent. Although Kam, Bernard, Like, and Lee were given corrective counseling for their failure to comply with the

[5] Marsh claims that he kept no written record of any of his "surprise" site inspections, except if he discovered work safety violations.

100% tie-off rule, none of them were suspended or terminated as required by the Fall Protection Policy. The disciplinary aspect of the Fall Protection Policy states in "bold" print:

> **VIOLATION:**
> **Working outside the warning area without an appropriate fall protection device for any length of time *will* result in *immediate* suspension or termination of employment.**
> (Emphasis in italics)

Respondent asserts that its decision not to suspend or terminate the four workers was based on the: (i) experience of the men; (ii) lack of any prior violation of the Fall Protection Policy of the men, (iii) confirmation that after this incident, the four men understood the Fall Protection Policy; and (iv) that the workers completed re-training on December 17, 2012. (See, IES Residential, Inc.'s Post-Trial Brief at pages 5 and 6.) Respondent's witnesses testified variously that the decision not to suspend or terminate the four workers was motivated by the following: Hawaii was a new market for Respondent; the four workers were given the "benefit of the doubt" because they were new employees; Respondent had invested much time and training in the workers to perform pv installation work; this incident was a "one-time" occurrence; and the workers were given follow-up training after the incident.

The reasons cited by Respondent for its decision not to enforce the disciplinary aspect of the Fall Protection Policy (i.e., suspension or termination of the four workers) are inadequate and questionable. Regarding Respondent's reliance on the lack of any prior violation of the Fall Protection Policy by the four men as grounds for leniency, the Board finds this excuse to be suspect since these four men were only employed by Respondents for a period of a few months prior to December 14, 2012.[6] To accept this excuse for something that Respondent dedicated so much time, money and effort towards is unacceptable, especially when these four men were "fresh" off of their safety training. It seems that Respondent's decision not to discipline the four workers was motivated by its business need to have enough workers to perform the pv installation jobs. Regardless of Respondent's reasons to not suspend or terminate the four workers, the Board finds it disturbing that Respondent chose to disregard and violate its own Fall Protection Policy calling for either the suspension or termination of the worker on its first violation.

Respondent's counsel argued in the January 11, 2016 hearing on Respondent's Exceptions that Respondent's worker safety program makes every worker responsible for his or her own safety compliance, and that the Respondent is not "strictly liable" for any such violation. The Board agrees that an employer should not be held strictly liable for any worker safety violation, however, the employer must be held accountable for the lax enforcement of its worker safety rules.

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[6] Bernard was hired less than a month prior to December 14, 2012. Like was hired on September 4, 2012. Lee was hired on July 23, 2012. Kam started working for Respondent sometimes in mid-2012 and was given fall protection training in June and July of 2012.

In this case, Respondent's Fall Protection Policy was disregarded and violated at all three levels of the company: (i) at the worker level where all four workers violated the 100% tie-off rule, (ii) at the field-supervisory level when Lee violated the tie-down rules and allowed other workers to violate the same, and (iii) at the top-management level when Respondent's executive office allowed the four workers to violate its Fall Protection Policy and avoid the policy-mandated discipline.

The Board takes notice that Peter Lee was hired by the Respondent to be the "lead man," and there is no dispute he was acting in this role at the Alewa Work Site on December 14, 2012. It is undisputed that Lee failed to comply with the Fall Protection Policy himself and also allowed the other three workers who were under his supervision to disregard the safety rules. As such, the heightened scrutiny in an "employee misconduct" defense as advocated in the Kiewit Decision shall be followed in this case. If Respondent now contends in Respondent's Exceptions that no evidence was submitted establishing that Lee had supervisory authority over the men at the job site, the obvious question that arises out of Respondent's new position is whether anyone was in charge at the Alewa Work Site and how did Respondent oversee the implementation of its Fall Protection Policy out in the field? The Board received contradictory evidence when Johnson testified that Respondent designated for every installation job a "lead man" whose responsibility was to identify safety concerns and to monitor safety compliance.[7] In any event, regardless of how Respondent characterizes Lee's role as a "lead man" or "supervisor" at the Alewa Work Site, it is clear that Respondent's enforcement of its Fall Protection Policy was lax because it either did not have a plan to conduct on-site oversight and monitoring of its safety rules because it did not have a "supervisor" in charge of safety or because it's company-designated "competent person" was not properly performing his/her job.

The Board takes further notice of Respondent's argument in its Exceptions that "even under the heightened standard, Lee's conduct was unpreventable,"[8] incorrectly reaches the conclusion that "Lee was disciplined after the Citation . . . and that his conduct was unpreventable."[9] This statement by Respondent in its Exceptions ignores the fact that Lee was not suspended or terminated which was the required disciplined for this type of violation of the Fall Protection Policy. Respondent's total dismissal of the fact that three other workers (Kam, Bernard and Like) violated the Fall Protection Policy by not wearing fall protection equipment, and that Respondent's executive office further violated the Fall Protection Policy by not suspending or terminating any of the four violators of the 100% tie-off rule (let alone not conducting "corrective training" of the entire Alewa Work Site Crew on December 17, 2012) is a glaring oversight in its argument, also. The Board does not ignore Respondent's failure to complete its self-promise to conduct "corrective training" involving every member of the Alewa Work Site crew. Respondent placed great reliance

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[7] Johnson's testimony was regarding the "competent person" training and designation.
[8] See, Section III.C. of Respondent's Exceptions on pages 14 and 15.
[9] Id.

on its "corrective training" planned for the employees; however, the evidence shows that Respondent failed to complete this remedial action.

Lastly, Respondent argued for the first time at the January 11, 2016 hearing on Respondent's Exceptions that its decision to not discipline the four workers is irrelevant to the discussion regarding the employee misconduct defense because Respondent's decision occurred after the December 14, 2012 event. In other words, Respondent argues that the employee misconduct defense should focus solely on the events that occurred up to time of the employee misconduct, and that the employer's response to the misconduct should be ignored because the employee's response could not have impacted the employee misconduct. The Board disagrees with Respondent's argument and approach in applying the employee misconduct defense to the case at hand. The Citation and the issues in this case are based upon and take into consideration the acts of Respondent and its workers that involve the worker safety violation that occurred on December 14, 2012, including but not limited to acts relating to the remediation of the violation and the disciplinary and enforcement actions of the employer. For Respondent to argue that all post-violation acts are irrelevant is bad policy and not in the interest of the promotion of proper worker safety. Of course, if Respondent had disciplined its four workers with either their suspension or termination as stated under its Fall Protection Policy, Respondent would be seeking favorable consideration from the Board, and rightfully so, of its immediate action to enforce its disciplinary rules. Unfortunately, Respondent did not enforce its disciplinary rules in this case, and the Board will not ignore this glaring misconduct by Respondent's executive office.

Therefore, the Board finds and concludes that Respondent has not met the requirement of Element #4 and cannot successfully assert the "employee misconduct" defense because Respondent failed to enforce its Fall Protection Policy for the violations that occurred on December 14, 2012, at the Alewa Work Site.

D. The Penalty of $825.00 Assessed by the Director is Correct.

As stated in Section II.B. above, the penalty was calculated according to HIOSH's standard policies and procedures to avoid any arbitrary determination of a penalty.

Except for Respondent's challenge to the penalty through its "employee misconduct" defense, Respondent does not challenge HIOSH's calculation of the penalty. Since the Board has found that Respondent has failed to establish its "employee misconduct" defense, the Board finds the penalty of $825.00 assessed by HIOSH to be correct, and is hereby affirmed.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board orders that the Citation resulting from HIOSH Inspection Number 316268127 conducted on December 14, 2012, including the Director's characterization of the violation as "serious" and the penalty of $825.00, is hereby AFFIRMED.

Dated: Honolulu, Hawaii, February 3, 2016.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

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SESNITA A.D. MOEPONO, Member

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