STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and ELEMENTAL ENERGY LLC dba SUNETRIC, Respondent.	CASE NO. OSH 2014-33 DECISION NO. 33 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 have thoroughly reviewed all the evidence and arguments presented, 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.

I. PROCEDURAL HISTORY

On October 9, 2014, the Board received from the Director a Notice of Contest dated October 7, 2014, regarding the Citation and Notification of Penalty (Citation) issued to Respondent ELEMENTAL ENERGY LLC, dba SUNETRIC (Respondent or Sunetric), on September 2, 2014. The Citation was based on Inspection Number 317667855 which was conducted on April 22, 2014 (Inspection) by the Director's Occupational Safety and Health Division (HIOSH) at Sunetric's job site on North Kaniku Drive in Kamuela, Hawaii. The Director cited a "serious" violation of 29 CFR 1926.1053(b)(1) [chapter 12-110-50(a), HAR] and assessed a proposed penalty of $990.00

(for Citation 1, Item 1a); a "serious" violation of 29 CFR 1926.1053(b)(6) [chapter 12-110-50(a), HAR] and no assessment of a penalty (for Citation 1, Item 1b); a "serious" violation of 29 CFR 1926.1053(b)(4) [chapter 12-110-50(a), HAR] and no assessment of a penalty (for Citation 1, Item 1c); a "repeat serious" violation of 29 CFR 1926.501(b)(1) [chapter 12-110-50(a), HAR] and assessed a proposed penalty of $8,250.00 (for Citation 2, Item 1). Respondent contested the Citation by letter to HIOSH on September 18, 2014.

An initial conference/settlement conference was held on October 20, 2015, and a January 26, 2016 trial date was scheduled. By Order No. 722, the trial date was rescheduled to April 26, 2016.

On April 26, 2016, an evidentiary hearing (hearing) was held where oral testimony and documentary evidence were received by the Board. At the hearing, the parties concurred that the sole issue for determination by the Board is whether Sunetric has established the "employee misconduct" defense, thereby absolving Sunetric of all responsibility and liability for the April 22, 2014 violations. The Director withdrew Citation 1, Item 1c, alleging a serious (grouped) violation of 29 CFR 1926.1053(b)(4), HAR. The parties agreed that there is no dispute as to the occurrence of the alleged violations, the seriousness of the violations, the repeat nature of one violation and the dollar amount of the penalties imposed. On April 26, 2016, Director called HIOSH inspector Charles Clark (Clark) (who conducted the inspection) to testify, followed by cross-examination by Sunetric's counsel. Sunetric did not call any witnesses to testify. Following the evidentiary hearing, the Director and Respondent submitted post-hearing memoranda supporting their respective positions on May 16, 2014.

II. FINDINGS OF FACT

A. The Inspection.

Respondent is a photo-voltaic (PV) installation company doing business in Hawaii as Sunetric. On April 21, 2014, HIOSH inspector Clark received an email message from Peter Spear (Spear), the property manager of The Village at Mauna Lani, a gated community in Kamuela, Hawaii. Spear reported that he had observed employees of Respondent working for over an hour installing PV panels/frames on a residential building roof without using proper fall protection. With his email, Spear included six photographs of Respondent's employees working on the building roof. Clark obtained authorization from his Oahu supervisor to initiate a referral inspection. On April 22, 2014, Clark witnessed safety violations committed by Respondent's workers, Wesley Tabler (Tabler) and Matt Lopez (Lopez), who were installing a PV system on a residential building located at 68-1025 N. Kaniku Dr. # 522, Kamuela, Hawaii 96743 (Kamuela Job Site). The building has a 1st floor roof and a 2nd floor roof. The 1st floor roof was approximately 9 feet 2 inches above the ground level, its sides/edges were unprotected and there

was no conventional fall protection system in place. The 2nd floor roof was approximately 9 feet above the 1st floor (or 18 feet above the ground); its sides/edges were also unprotected and without conventional fall protection systems.

Citation 1, Item 1a: Clark observed that one half section of a fiberglass extension ladder used at the Kamuela Job Site by the two Sunetric employees, Tabler and Lopez, did not have side rails extending three feet above the landing. The lack of proper ladder installation exposed the two workers using the ladder to serious injuries due to fall hazards.

Citation 1, Item 1b: Clark observed that one half of an extension ladder used by the two Sunetric workers to gain access from the first story roof to the second story was not secured to prevent accidental displacement.

Citation 1, Item 1c: Clark observed that a fiberglass extension ladder was taken apart with each section being used as a separate ladder instead of as a single extension ladder.

Citation 2, Item 1: Clark witnessed two of Respondent's workers, Tabler and Lopez, working on the 2nd floor roof without any fall protection. Respondent was previously cited for two repeat violations of HIOSH fall protection standards, as follows:

1. HIOSH Inspection No. 313075640 issued on September 14, 2011, which became a Final Order on October 20, 2011. The citation was for several "serious" violations, including workers who were not wearing any fall protection equipment (Citation 1, Item 3), inadequacies in the fall protection training (Citation 1, Item 4a), and inadequacies in the workers' knowledge of the use of fall protection systems or equipment (Citation 1, Item 4b).
2. HIOSH Inspection No. 316272970 issued on December 16, 2013, which became a Final Order on January 6, 2014). The citation was for a "repeat serious" violation by workers who were working on a surface more than 6 feet above the ground without any fall protection system (Citation 1, Item 1).

At the Board hearing, Clark testified that on April 22, 2014, when he inspected the Sunetric Kamuela Job Site, he saw two workers, identified as Tabler and Lopez, preparing framing for solar panels on the residential property's second story roof, while wearing safety harnesses without any lanyards attached and without any anchorage to the roof. Clark spoke with Corey Green (Green), Sunetric's electrical foreman at the job site (working inside the garage of the Kamuela residential property, but not working on the roof) who stated that he told Tabler to "tie off" two days in a row, and he observed that both Tabler and Lopez were not tied off. Green also told Clark that Tabler was the lead person and safety coordinator on the installation side of the project. In his testimony,

Clark noted that Tabler is also referred to in the record as Sunetric's "roof supervisor." Tabler told Clark that the failure to "tie off" was his own fault, he should have used fall protection and that "he would probably get fired." Lopez told Clark that, while working on the roof, he could not find a beam to install the fall protection anchors, but that this was Tabler's responsibility. Clark testified that when asked, nobody produced any fall protection gear (other than the unattached harnesses Tabler and Lopez were already wearing). Both Tabler and Lopez were terminated by Sunetric on April 28, 2014, several days after the Kamuela Job Site violations.

Clark further testified that upon his inspection, the ladders used for roof access at the Kamuela Job Site did not meet the Occupational Safety and Health (OSHA) and HIOSH requirements that all ladders extend three feet above the landing at each roof level.

For both the fall protection and ladder violations, photographic evidence in the record supports Clark's testimony, and Clark's findings, as discussed in his HIOSH report and buttressed by his hearing testimony, is unrebutted by Sunetric, which produced no witnesses or any the April 26, 2016 hearing.

B. Penalties under the Citation.

HIOSH issued the Citation to Respondent as described above.

According to Clark, the $990.00 and $8,250.00 penalties assessed by HIOSH were calculated pursuant to HIOSH's standard policies and procedures to avoid an arbitrary determination by the inspector. The amount of the penalty was determined by considering the severity of a resulting injury and the probability of an accident. To calculate the $990.00 penalty for the ladder violation, a severity level of "medium" was assessed due to the probable injuries, which are fractures and contusions, a probability of "lesser" was given due to the lower likelihood of an accident occurring, and a gravity factor of "02". This resulted in a gravity-based penalty of $2,200.00. 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 40% discount based on its 87employees, a 15% discount based on "good faith" with no additional discount based on a lack of any prior safety citations. Hence, the gravity-based penalty was reduced by 55%, which resulted in the proposed penalty of $990.00. (See, Exhibit 1 at page 64.) For the fall equipment violation, a gravity factor of "03" and a repeat factor of "2" resulted in a gravity-based penalty of $13,750.00. To calculate the $8,250.00 penalty for the fall protection violation, a severity level of "high" was assessed due to probable injuries, and a probability of "lesser" was given due to the lower likelihood of an accident occurring. The gravity based penalty was adjusted or reduced in consideration of Respondent's company and its work safety history. Respondent qualified for a 40% discount based on its 87 employees, which resulted in the proposed penalty of $8,250.00. (See, Exhibit 1, page 74.)

C. Respondent's Challenge to 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 obtain 100% compliance with the company's Fall Protection Policy and that the conduct of Tabler and Lopez on April 22, 2014 constitute willful, careless and reckless acts of individuals which should not be imputed to Respondent. Sunetric alleges, through answers to interrogatories (Answers) by Respondent's safety manager, which were not subject to cross examination at hearing, that Sunetric conducts documented safety compliance inspections at Respondent's job sites on a regular basis. Although the Answers state that "[e]ach safety inspection is documents and kept in a safety file at Sunetric's office," the exhibits filed by Sunetric in this case include only one unsigned on-site safety inspection document, dated April 22, 2014, with no verification that this document pertains to the Kamuela Job Site in question. At hearing, Clark, the sole witness to present testimony, stated that he could not make the determination of "employee misconduct" in this case. The Board finds that Sunetric failed to establish the affirmative defense of "employee misconduct" for the following reasons as discussed below.

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.

A. Respondent Violated OSHA Standards 29 C.F.R. § 1926.501(b)(1), 29 C.F.R § 1926.1053(b)(1), and 29 CFR § 1926.1053(b)(6) 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.

Respondent does not challenge or dispute the Citation. Therefore, the sole issue to be determined at trial was whether the affirmative defense of "employee misconduct" is applicable to this case.

B. The Characterization of the Subject Notice of Violation as "Serious" Is Correct.

Respondent did not dispute, or challenge at hearing, the serious nature of the violations.

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

In Director, Department of Labor and Industrial Relations v. Kiewit Pacific Company (Case No. OSAB 96-056) (March 20, 2001) (Kiewit Decision), the Labor and Industrial Relations Appeals Board (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, "[w]hen 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 hearing, including the exhibits and the direct testimony and cross examination of Respondent's witness, 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.

Sunetric's Fall Protection Policy is a clear and unambiguous statement of Respondent's safety rules regarding working conditions on rooftops. Clark's hearing testimony and the record in the file indicate that Sunetric's written policy was good. Sunetric's policy is defective, however, because it does not define the responsibilities of Respondent's supervisors. Also, Sunetric's Safety Manager, Justin Abrell (Abrell) stated in his Answers that he provided site-specific safety plans, fall protection and ladder safety training to Sunetric employees who were at the Kamuela Job Site. However, Sunetric called no witnesses to testify at the hearing regarding Sunetric's safety policies at each job site. From its review of the record, the Board notes that Sunetric's Fall Protection Policy fails to articulate the specific safety duties of the leadman at the job site. (See, Respondent's Trial Exhibits, page 000003.) Specifically, the Fall Protection Policy does not detail the foreman's responsibility to monitor his crew for safety compliance. Id. at 000003.)

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.

There is nothing in the record about the responsibility of Sunetric's lead person to enforce Sunetric Fall Protection Policy. The deficiency in Respondent's safety programs seems to be its communication to its management in the field (i.e., Tabler at the Kamuela Job Site) and of the need to continuously monitor, inspect, and 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 of Element 3 due to a lack of proof that Respondent conducted adequate, necessary field inspections of the work being performed by its workers. There is no clear evidence in the record of a systematic field inspection program in effect prior to April 22, 2014, the date of the violations discovered by HIOSH at the Kamuela Job Site. There is also no evidence that Respondent performed frequent on-site inspections until after the occurrence on April 22, 2014 at the Kamuela Job Site. Although the Answers (in particular Answer 4) by Abrell, state that Respondent conducts 'unannounced, random safety compliance inspections on each job site on a regular basis, and each safety site inspection is "documented and kept in a safety file at Respondent's office", no such inspection documents were produced by Respondent for the Kamuela Job Site and offered into evidence in this case. In his Answers, Abrell asserted that "[n]o employee was warned or disciplined on the [Kamuela] work site where the violation occurred before April 22, 2014." Neither Abrell nor any other supervisory employee of Respondent was called to testify at the hearing before the Board. The record shows that Tabler and Lopez worked at the Kamuela Job Site for two days before their violation was brought to HIOSH's attention by a third party referral from the property manager for the Villages at Mauna Lani, who sent HIOSH some email photographs taken of the two employees on April 21, 2014, the day before the HIOSH inspection.[1] Also, the record shows that Tabler had been given a prior, final warning by Respondent for working without a fall restraint at another job site for Respondent on January 10, 2013. Nevertheless, Tabler was assigned the lead man or supervisor position on the installation job site roof at the Kamuela Job Site by Respondent in April 2014, and he again violated Respondent's Fall Protection Policy.

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

The disciplinary aspect of the Fall Protection Policy stated in the records produced by Sunetric, is as follows:

> DISCIPLINARY NOTICES are given and completed by supervisors when safety or work rules are violated. Employees who fail to follow Sunetric's fall protection guidelines are terminated immediately.

There is no dispute that Respondent enforced the disciplinary aspects of the Fall Protection Policy after being cited by HIOSH for the violations that occurred at the Kamuela Job Site on April 22, 2014, and consequently Tabler and Lopez were terminated immediately by Respondent. However, the Board finds that Respondent's enforcement of its work safety policy prior to April 22, 2014 was lax and the violations that occurred at the Kamuela Job Site were "just waiting to happen."

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[1] See, Director's Exhibit EEL-71.

As stated above, the Board takes notice that Tabler was assigned by the Respondent to be the roof installation "lead man," and the Board finds that he was acting in this role at the Kamuela Job Site on April 22, 2014. It is undisputed that Tabler failed to comply with the Fall Protection Policy himself and also allowed his co-worker Lopez, who was under his supervision, to disregard the safety rules. As such, the heightened scrutiny in an "employee misconduct" defense, as advocated in the Kiewit Decision, is pertinent to this case. Respondent contends that no clear evidence was submitted establishing that Tabler or even Green had supervisory authority over the men at the Kamuela Job Site. The obvious questions that arises out of Respondent's position is whether anyone was in charge at the Kamuela Job Site, and how did Respondent oversee the implementation of its Fall Protection Policy in the field? The Board received evidence from Clark's testimony that Respondent designated for every installation job a "supervisor" whose responsibility was to identify safety concerns and to monitor safety compliance. In Respondent's Post-Trial Brief, Respondent argues, based on Abrell's answer that Destry Runyun was the Journey Electrician Supervisor for Respondent, and he did not witness the safety violation. No evidence was presented that Runyun was at the Kamulea Job Site on April 22, 2014. Nevertheless, regardless of whether Respondent characterizes Tabler's role as an installer "lead man" or "supervisor" at the Kamuela Job Site, it is clear that Respondent's enforcement of its Fall Protection Policy was lax because it either did not have a proper plan to conduct on-site oversight and monitoring of its safety rules, or because it did not have a competent "supervisor" in charge of safety.

The Board does not accept Respondent's argument that Tabler's and Lopez's violation of fall protection rules were "isolated incidents" and therefore support an "unpreventable employment misconduct defense." This statement by Respondent ignores the fact that Tabler was given a final warning, but not suspended or terminated by Respondent, for a similar fall protection violation that occurred on January 10, 2013. In that incident, Tabler was installing solar panels on a rooftop without fall protection. At 10:45 a.m. that day, Tabler was told by Jordon Robello, a supervisor at the job site, to tie down. Respondent's safety manager, Abrell, was asked to visit the job site and check on the fall protection situation, and when he arrived at the jobsite at 11:45 a.m. (one hour after Robello confronted Tabler), Tabler was still not tied down. Abrell knew that Tabler failed to heed the warnings of Robello, but Abrell merely issued Tabler a verbal warning (similar to what Robello did to Tabler an hour before) and no greater disciplinary action was taken against Tabler.

The Board also notes that Respondent was cited by HIOSH for fall protection violations occurring on July 14, 2011, because ten solar installation employees were working on an low-sloped roof 30 feet above the ground wearing full body harnesses that were not secured to an anchor point and with a one-foot gap between a scissors lift platform and the edge of the roof. The Board further notes that Respondent was cited by HIOSH for a repeat violation occurring on

November 25, 2013, when Respondent's employees installing solar panels on a job site roof at a height of 22 feet 6 inches were not adequately protected from injury or death by a fall protection system.[2] Rather than "isolated incidents," the Board finds that there is a pattern of fall protection violations at Respondent's job sites over a four year period that was not curbed by Respondent's Fall Protection Policy in place.

In its defense, Respondent cites the decision in W.G. Yates & Sons v. Occupational Safety and Health Review Commission, 459 F.3d 604, 608-08 (5th Cir. 2006) for the proposition that even if a worker is a supervisor, the supervisor's malfeasance cannot be imputable to the employer where the employer's safety policies and discipline rendered the misconduct unforeseeable. In W.G. Yates, the court vacated the Commission's order, which reversed the citation based on the employers' successful unforeseeable employee misconduct defense. The court found that employer Yates could be charged with knowledge only if the supervisor's knowledge of his own misconduct is imputable to Yates, which requires that the supervisor's violative conduct be foreseeable. The case was remanded to the Commission to allow the respondent to conduct a foreseeability analysis to determine whether the supervisor's knowledge could be imputed to Yates. Respondent argues that even if Tabler or another Sunetric employee was a supervisor at the Kamuela Job Site, the rationale in W.G. Yates "would prevail". The Board disagrees with Respondent's premise.

In the instant case, having found Tabler, the installation "lead man," to be a supervisor by definition, the Board also finds that Tabler's malfeasance, in not using fall protection and unsafe ladders, and in allowing Lopez to do so also, can be imputed to Respondent, because it put Tabler in charge as "lead man" on the Kamuela Job Site roof when it knew or should have known that Tabler was guilty of prior malfeasance in 2013 while in Respondent's employ. Tabler's malfeasance in 2014 was foreseeable, and Respondent erred in placing Tabler in charge on the Kamuela Job Site roof in April 2014. Also, Tabler's and Lopez' violative practices on April 21 and 22, 2014 were in plain view, and Green, the foreman for Respondent's electrical crew at the Kamuela Job Site, observed Tabler and Lopez working without fall protection on both days and failed to take any action to mitigate the situation. As a supervisor for Respondent on the job site, Green's knowledge can also be imputed to Respondent.

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 adequately inspect, detect and correct the violations that occurred on April 22, 2014, at the Kamuela Job Site as discussed under Elements # 3 and #4 above.

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[2] See, Director's Exhibit EEL-128.

D. The Penalties of $990.00 and $8,250.00 Assessed by the Director are Correct.

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

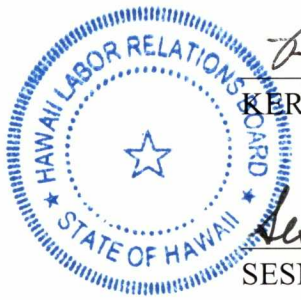
Except for Respondent's challenge to the penalties through its "employee misconduct" defense, Respondent does not challenge HIOSH's calculation of the penalty. Since the Board has found that Respondent has failed to establish its "employee misconduct" defense, the Board finds the penalties of $900.00 (for Citation 1, Item 1a) and $8,250 (for Citation 2, Item 1) assessed by HIOSH to be correct, and are hereby affirmed.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board orders that the Citation issued to Sunetric on September 2, 2014, resulting from HIOSH Inspection Number 317667855 conducted on April 22, 2014, including the Director's characterization of the violations as "serious" and "repeat serious" (as is further described herein) and the penalties of $990.00 and $8,250.00, are hereby AFFIRMED. This case is closed.

Dated: Honolulu, Hawaii, May 26, 2016.

HAWAII LABOR RELATIONS BOARD



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