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Case No. OSH 2015-34

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and HI-POWER SOLAR, LLC, Respondent.	CASE NO. OSH 2015-34 DECISION NO. 34 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, 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 March 25, 2015, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), through the Hawaii Occupational Safety and Health Division (HIOSH), issued a Citation and Notification of Penalty (Citation) to Respondent Hi-POWER SOLAR, LLC (Respondent or Hi-Power). The Citation resulted from Inspection No. 1041446 conducted on February 18, 2015, and alleged in Citation 1, Item 1 a "serious" violation of 29 CFR 1926.503(c) [12-110-50(a), HAR] (employer required to retrain employee when any already trained employee does not have the understanding and skill required by paragraph (a) of this section) and imposed a penalty of $1,050.00; and in Citation 1, Item 2, a "repeat-serious" violation of 29 CFR 1926.501(b)(1) [12-110-50(a), HAR] (employees working without adequate fall protection system) and imposed a penalty of $ 4,400.00. Respondent contested the Citation by a letter dated and delivered on March 31, 2015. On May 18, 2015, HIOSH transmitted the March Notice of Contest, dated March 31, 2015, to the Hawaii Labor Relations Board (Board).

On June 21, 2016, the Board held an initial conference/settlement conference.

On June 28, 2016, the Board issued Order No. 810 setting a trial date of September 9, 2016 and other deadlines and cutoff dates.

On September 9, 2016, the Board conducted the trial. At the trial, the Board heard testimony from the HIOSH Health Branch Manager Tin Shin Chao and Hi-Power Project Manager Mario Ramirez (Ramirez). The Board accepted Exhibits (Ex.) C-1 through C-5[i] and Ex. 2 to Ex. C-5 stipulated into evidence by the parties. At the trial, the Director withdrew Citation 1, Item 1 alleging the violation of 29 CFR 1926.503(c) and amended the penalty associated with Citation 1, Item 2 from $4 400 to $2,800. Based on the record in this case, the issues to be determined are:

1. Whether Respondent violated 29 CFR 1926.501(b)(1) [12-110-50(a), HAR].

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

   b. If so, was the imposition and amount of the proposed $2, 800.00 penalty appropriate?

2. Whether there are applicable affirmative defenses, including but not limited to "employee misconduct" negating the violation?

On November 14, 2016 at 4:30 p.m., the Director filed her POST-HEARING MEMORANDUM OF THE DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS.

On November 14, 2016 at 9:11 p.m., Hi-Power filed RESPONDENT'S POST-TRIAL BRIEF.

On November 18, 2016, the Director filed DIRECTOR'S MOTION TO STRIKE RESPONDENT'S POST-TRIAL BRIEF arguing that the deadline for the filing of the parties' closing brief was November 14, 2016; the applicable rules require the parties to file their briefs by the close of business or 4:30 p.m. on the date that the briefs were due; and the Respondent's post-hearing brief, which was filed at 9:11 p.m. on November 14, 2016, is therefore, untimely. In addition, the Director asserts that the audio recording and not the written transcript constitutes the official record of the day's proceeding and that any inconsistency between the audio recording and the written transcript should be resolved in favor of the audio recording.

On November 22, 2016, Hi-Power filed RESPONDENT'S MEMORANDUM IN OPPOSITION TO DIRECTOR'S MOTION TO STRIKE RESPONDENT'S POST-TRIAL

BRIEF E-FILED NOVEMBER 18, 2016. In support, Respondent contends that the Director conceded that there are no specific authorities clearly establishing that Hi-Power's Post-Trial Brief was untimely and cited no on-point controlling authorities supporting the position that the transcript of the recorded proceedings cannot be used as the official record of the trial.

II. FINDINGS OF FACT

Hi-Power is a full-service renewable energy company, which has been installing photovoltaic systems since 2010. In February 2015, Hi-Power employed five employees.

The February 18, 2015 Incident and Investigation

On February 18, 2015, Hi-Power was installing solar panels on a residential work site (work site) at 1360 Hoolaulea in Pearl City, Hawaii.

On that day, after the crew arrived at the work site, the Hi-Power operations manager responsible for overseeing the project and foreman [ii] Ramirez held a safety meeting with the crew of employees Radford Takahashi (Takahashi), Richard Carvalho (Carvalho), and Josh Orr (Orr and collectively three Hi-Power employees), who were working at the work site. The safety meeting included instructions regarding the location of the manuals, the checking of harnesses, and review of the items on the safety checklist.

After the meeting, the ladders were put up. Ramirez got up on the roof, put the panels in place, and had the crew put on their harnesses and ropes.

Ramirez remained on the work site for an hour and a half until leaving for another job. During this time, per Ramirez, the three Hi-Power employees had climbed on the roof, were wearing their harnesses, and tied off in compliance with the Hi-Power fall protection policies requiring the wearing of PPE (personal protective equipment) and one hundred percent tie-off. Ramirez designated "everybody" to be responsible for the fall protection policy but no one to oversee everyone. Ramirez stated that safety violations, including failing to tie-off, were common.

On that day, then-HIOSH Environmental Health Specialist Nicholas Gosnell[iii] (Gosnell) was passing the work site on his way to another inspection and observed three workers working on the top of a one-story residential house. The work being performed was solar panel installation. There were brackets installed on the roof, and the workers were cleaning up rubbish and cutting material in preparation for the next phase of solar panel system installation. None of the workers were protected from a fall hazard by conventional fall protection, such as guard railing, netting, or a fall protection harness system.

Gosnell arrived at the work site about 11:15 a.m. and proceeded to take photos of the workers continuing to perform work on the roof. After taking the photos, Gosnell told the workers to get off the roof. Gosnell asked that management be called because there was no foreman present on the work site and no response regarding who was in charge.

At the time of the inspection, the job was about 50 percent completed with the previous installation work done before the day of the inspection. The employees were installing the rails and the lashing before installing the PV panels. Gosnell measured the distance between the lower level or the ground and the roof as 11 feet, 3 inches with a laser measuring instrument. The surface of the ground was grass and compacted dirt. If a worker had fallen while working on the roof, they would likely have sustained a fracture. Gosnell did not measure the pitch of the roof but based on the photographs determined that the roof had a low pitch (not very steep).

While a personal fall arrest system was feasible at the work site, including a harness, none of the employees were tied off. One of the employees was wearing his harness but not tied off. The other two employees had left their harnesses in the company vehicles. Gosnell did not go up on the roof. However, Gosnell saw no anchor points from his vantage point during the investigation and from the photos. Two of the employees admitted that there were no anchor points on the roof[iv] because the anchor point installation was to be done after the cleanup.

Ramirez arrived, and Gosnell conducted the opening conference and a walk-through inspection of the work site. Gosnell then interviewed and obtained statements from the three workers, who all verified receiving fall protection training through Safety Systems on different dates and being on the roof between 5-15 minutes cutting excess material and picking up rubbish.

Gosnell held a closing conference with Ramirez, which included addressing safety and health concerns, discussion of the potential violation, transmittal of a copy of the employer rights, encouragement of an informal conference, an offer of abatement assistance, and discussion of the consultation program.

Respondent does not dispute that the three employees were on the roof and not observing and complying with Hi-Power's safety protocol and hundred percent tie off policy.

At the time of the alleged violation, Ramirez was the only Hi-Power foreman and the employee responsible for detection of violations and compliance and enforcement of the fall protection program. Ramirez provided corrections immediately "on the spot." The discipline imposed was based on the severity of the misconduct, and verbal warnings were given for fixing of a harness or putting themselves or others in danger.

On March 25, 2015, HIOSH issued the present Citation for the February 18, 2015 incident (February 18, 2015 incident or incident) and investigation (investigation).

On April 10, 2015, Ramirez met with Gosnell and another woman from HIOSH for an informal conference and provided copies of Hi-Power's safety and health program.

December 18, 2013 Incident and Prior January 18, 2014 Citation

Hi-Power was cited previously for a violation of 29 CFR § 1926.502(b)(1)[v] in Inspection No. 316273309, Citation 1 Item 2 issued on January 18, 2014 (2014 citation). This citation was based on an investigation after a HIOSH inspector observed three employees working on the roof of a two-story residence at 250 Mala Street in Wahiawa, Hawaii without fall protection on December 18, 2013 (2013 incident). At the time of the investigation, the project manager and installer Ramirez was on the job site. This citation was resolved by a Settlement Agreement, dated February 4, 2014 (ISA), entered into on or about February 3, 2014 by Hi-Power President/CEO Ronald Romero and HIOSH Administrator Diantha M. Goo, stating in relevant part:

SETTLEMENT AGREEMENT

The undersigned Employer and the Director of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division (HIOSH), in settlement of the citation(s) and penalties, issued on January 10, 2014, as a result of the above inspection hereby agree as follows:

1. The Employer and Director agree that the citation(s) and penalties are amended as follows:

Citation 1, Item 1	Penalty reduced to	$400.00
Citation 1, Item 2	Penalty reduced to	600.00
Citation 2, Item 1	Abatement extended to 3/1/14	0.00
	TOTAL	$1,000.00

2. The penalty reduction is in consideration of the Employer's prompt abatement of the violations and the efforts to prevent future reoccurrence. The Employer agrees to contact the Consultation and Training Branch (586-9100) to schedule a visit to at least one of its job sites by August 2014.

3. The Employer, by signing this Settlement Agreement, hereby waives its rights to contest the original citation(s) and penalties, and as amended in this agreement.

4. The Employer agrees to immediately post a copy of this Settlement Agreement in a prominent place at or near the location of the violation(s) referred to above. This Settlement Agreement must remain posted until the violations cited have been corrected, or for 3 working days, whichever is longer.

5. The Employer agrees to continue to comply with the Hawaii Occupational Safety and Health Law and the applicable safety and health standards.

6. By entering into this agreement, the Employer does not admit that it violate the cited standards for any litigation or purpose other than a subsequent proceeding under the Hawaii Occupational Safety and Health Law.

7. The Employer agrees and understands that if employer fails to comply with each and every term of this agreement, this agreement shall be null and void upon written notice by the Director and the original citation(s) and penalties issued on January 10, 2014, shall become a final order.

8. The Employer agrees:

    a. to pay the assessed penalties as modified herein within 20 days of the date this agreement is executed; and,
    b. to pay reasonable attorney's fees and costs if the employer defaults on the payment of the penalties and Director institutes legal action to recover the unpaid penalties.

9. If this Settlement Agreement is not executed and returned to HIOSH by February 4, 2014, then the citation(s) and penalties issued on January 10, 2014, will become a final order of the Director of the Department of Labor and Industrial Relations. Please make sure you allow sufficient time for mailing.

10. This Settlement Agreement should be considered as an order of the Director of the Department of Labor and Industrial Relations.

There is no dispute that the Citation 1, Item 2, a "repeat-serious" violation of 29 CFR 1926.501(b)(1), was based on the citation settled by the ISA.

Hi-Power Fall Protection Program and Policies

In 2014, Hi-Power created and invested in a safety program involving employee training the purchase of new safety equipment including harnesses, ties for ladders, and ladders, and a fall protection program. The fall protection policy required that employees wear proper PPE and tie off any time they are more than six feet above ground. The program included the establishment and communication of work rules through training and certification, required safety meetings, constant reminders, and monitoring employee compliance.

In addition, Hi-Power had a Hi Power Solar Construction Safety Policy created by Safety Systems and contained in a binder present in the Hi-Power trucks on February 18, 201[5]. The Policy was applicable to all company employees and provided similar fall protection requirements and discipline for safety rule violations.

Finally, Hi-Power had a written Fall Protection Program, which was signed and acknowledged as received by employees. This Program, in part, designated Ramirez as the Program Manager responsible for performance of routine safety checks, fall protection hazard assessments, enforcement of company safety policy and procedures, training of employees, and immediate correction of any unsafe practices or conditions. The Program further provided, among other things, that generally any work occurring six or more feet above a lower level must involve the use of fall protection; that guardrail systems, safety net systems, or personal fall arrest systems be provided to employees working six (6) feet or more above the lower level even for low-slope roofs with unprotected edges on residential construction; training for all employees before being required to work in areas where fall hazards exist; and that any employee engaging in improper conduct and/or not in the best interests of the Company be subject to discipline up to and including termination with or without prior notice, warnings or suspension.

Gosnell did not request Hi-Power's fall protection policy nor review the safety manual/binder, but Ramirez produced Hi-Power's safety and health policies upon returning to the work site for the opening conference and inspection of the work site.

Hi-Power also had a written disciplinary policy for safety policy violations, which was signed and acknowledged as received by employees. This policy provided that any safety rule violation, including for failure to use fall protection, could result in suspension or immediate termination, and a termination requirement for any employee receiving three written general violations within a six-month period. As implemented, the policy requires a written warning for a first offense, a final written warning for a second offense, and termination for a third offense for no safety equipment, personal protective harness, or tie down.

Training, Certification, and Prior Discipline of the Three Hi-Power Employees

On December 19, 2012, Takahashi received a certification from Safety Systems and Signs for completion of a training course on safe fall protection OSHA/HIOSH standards. On April 24, 2014, Carvalho received certification for a one-day fall protection rescue course satisfying requirements for OSHA's 1926.502 rescue standard from Guardian Fall Protection, which expired two years from the issuance date. Orr, as a new employee, took a fall protection certification class on February 17, 2015. Ramirez knew that Orr had taken the fall protection class on the day before the work site investigation.

Finally, the three employees signed an "Agreement" with Hi-Power that included the use of PPE, a daily safety meeting before the start of each job that addressed safety and fall protection topics, and disciplinary action for non-compliance with OSHA regulations and company fall protection policies. Carvalho signed this Agreement on June 30, 2014. Takahashi and Orr signed this Agreement and acknowledged receipt of the safety orientation and safety rules on March 11, 2015, after the February 18, 2015 incident and about the same time as their discipline was imposed for this incident.

On February 5, 2015, Carvalho and Takahashi had each received a verbal warning for a failure to tie on a previous Castillo job

On February 23, 2015, Carvalho, Takahashi, and Orr each received and signed off on a written warning for the fall protection policy violation for this February 18, 2015 incident. Hi-Power also took affirmative remedial action of suspending the three employees for one day without pay and placement on final written warning for the February 18, 2015 violations of the tie-off policy and failure to comply with the fall protection requirements based on this inspection.

I. CONCLUSIONS OF LAW

The Board has jurisdiction over this contested case in accordance with Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.

At all relevant times, Hi-Power was an employer, as defined in HRS § 396-3[vi] as a full-service renewable energy company.

A. MOTION TO STRIKE

As stated above, the Director filed a Motion to Strike Respondent's Post-Trial Brief based on the untimely filing of Respondent's post-hearing brief at 9:11 p.m. on November 14, 2016. In support, the Director argues that while the Board did not set a specific time for the briefs to be filed, Hawaii Administrative Rules (HAR) §§ 12-42-8(a) and 12-42-5(c) and the

Hawaii Labor Relations Board E-Filing Consent Form and Protocols for E-Filing (E-Filing Protocols) required the parties to file their briefs by the close of business at 4:30 p.m. on November 14, 2017. Further, the Director takes the position that the audio recording and not the written transcript constitutes the official record of the day's proceeding.

Respondent opposed the Motion to Strike contending that there is no requirement that post-trial briefs be e-filed by 4:30 p.m. or the Board's close of business. Further, regarding the transcript, Hi-Power argues that there was no ruling limiting the parties from using only the audio tape of the trial or barring the parties from obtaining a copy of the audio tape for transcription by a certified court reporter for submission into the record.

On the transcript issue, the Board has reviewed the record in this case and agrees with Respondent that the Board did not rule or bar a party from submitting a transcript of the trial for submission into the record.

Regarding the timeliness of Respondent's brief, the Board recognizes that the E-Filing Protocols and HAR § 12-42-8(a) and 12-42-5(c) may be read together to require that for a filing to be timely filed on November 14, 2017, the filing must be made by 4:30 p.m. Nonetheless, the Board is not able to find that the filing of Respondent's Post-Trial Brief at 9:11 p.m. on that date caused unfair surprise, was prejudicial, or abusive. In fact, the Director has not asserted any of these reasons to support the Motion to Strike. Consequently, the Board in its discretion denies the Motion to Strike. Sussel v. Hawaii Gov't Emp. Ass'n., AFSCME, Local 152, AFL-CIO, Board Case No. CU-13-75, Order No. 933, at *3 (1993); Messier v. Ass'n. of Apartment Owners, 6 Haw. App. 525,530, 735 P.2d 939, 944 (1987).

B. STANDARD FOR REVIEW

HRS § 396-11(h) provides in relevant part, "The appeals board shall afford an opportunity for a de novo hearing on any notice of contest…" and HRS § 396-11(i) provides in relevant part, "The appeals board may affirm, modify, or vacate the citation, the abatement requirement therein, or the proposed penalty or order…or remand the case to the director with instructions for further proceedings, or direct other relief as may be appropriate."

Under HRS § 91-14(g), an agency's legal conclusions are freely reviewable. Accordingly, where the underlying facts are undisputed and the agency's decision comprises a pure conclusion of law in statutory interpretation, **a**n agency's statutory interpretation is reviewed *de novo*. Dir., Dept. of Labor and Indus. Rel. v. Kiewit Pacific Co., 104 Hawai'i 22, 28, 84 P.3d 530, 536 (App. 2004) (Kiewit).

In Director, Dep't. of Labor and Indus. Relations. v. Permasteelisa Cladding Techs., Ltd., 125 Hawai'i 223, 257 P.3d 236 (App. 2011) (Permasteelisa), the ICA, in applying HRS § 91-14 (g)[vii] for review of the Board's decisions, set forth the applicable standards regarding the circumstances in which deference should be given to the administrative agency determination in a HIOSH case. The question of deference remains despite the standard of a fresh review of an agency's conclusions of law in statutory interpretation. Kiewit, *id.* at 27, 84 P.3d at 536.

Regarding the circumstances in which such deference should be given, the ICA stated:

> [W]hen reviewing a determination of an administrative agency, we first decide whether the legislature granted the agency discretion to make the determination being reviewed. If the legislature has granted the agency discretion over a particular matter, then we review the agency's action pursuant to the deferential abuse of discretion standard (bearing in mind that the legislature determines the boundaries of that discretion). If the legislature has not granted the agency discretion over a particular matter, then the agency's conclusions are subject to de novo review.
>
> [I]n deference to the administrative agency's expertise and experience in its particular field, the courts should not substitute their own judgment for that of the administrative agency where mixed questions of fact and law are presented. This is particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it.
>
> Where an administrative agency has adopted wholesale the relevant federal regulations into its administrative rules, "absent clear and unambiguous language in the federal regulation, a court must give deference to any reasonably acceptable interpretation by the federal agency or, in the absence of a federal interpretation, by the state agency."

Permasteelisa, 125 Hawai'i at 226-27, 257 P.3d at 239-40 (Citations omitted). The court's review is further qualified by the principle that the agency's decision carries a presumption of validity and the party seeking to reverse the agency's decision has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequence. Kiewit, 104 Haw. at 27, 84 P.3d 535 (App. 2004). "Simply stated, if an agency determination is not within its realm of discretion (as defined by the legislature), then the agency's determination is not entitled to the deferential 'abuse of discretion' standard of review. If, however, the agency acts within its realm of discretion, then its determination will not be overturned unless the agency has abused its discretion." Paul's Elec. Serv. v. Befitel, 104 Hawai'i 412, 417, 91 P.3d 494, 499 (2004). (Citations omitted)

Most significantly and specifically, in the HIOSH context involving a "split enforcement" structure between the Director and the HLRB, the ICA concluded that where the Director and the Board offer conflicting interpretations of an ambiguous regulation, the Director, as the agency generally charged with promulgation and enforcement, is given the deference over the Board, the adjudicative authority. Permasteelisa, 125 Hawai'i at 228-29, 257 P.3d at 241-242.

C. VIOLATION OF HAR § 29 C.F.R. § 1926.501(b)(1)

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. Permasteelissa, 125 Hawai'i at 227, 257 P.3d at 240 (*citing* Dir. Dep't of Labor & Indus. Relations v. Maryl Pac. Constr., Inc., Case No. OSAB 2001-18, 2002 WL 31757252, at *6 (2004) (Maryl Pacific).

29 CFR 1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Hi-Power does not dispute that the three Hi-Power employees were on the roof of residence at the work site and not complying with the safety protocol, including the hundred percent tie off policy. It was also not controverted that the height of the roof was 11 feet, 3 inches, and that the ground below was composed of compacted dirt and grass. Based on these undisputed facts, the 29 CFR 1926.501 standard applies to the present case. Further, there is no question that Hi-Power failed to comply with the standard and that the three employees had access to the violative condition. The three employees were on the roof without protection from a fall hazard by a conventional fall protection system, such as guardrails or netting. Nor were the employees using a personal fall protection system because two of the workers were not wearing their harnesses, the worker wearing a harness was not tied off, and there were no anchor points. Based on the record, the Board concludes that the first three criteria establishing the violation of the standard have been met.

Regarding the fourth element of knowledge, "[a]ctual 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. An employer has constructive knowledge of a violation if the employer fails to use reasonable diligence to discern the presence of the violative conditions. 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.'" Director v. Si-Nor, Inc., Board Case No. OSH 2003-17, Decision No. 11, at *19-20 (2/15/06). (Emphasis in original); Director v. Hawaiian Dredging Constr. Co., Board Case No. OSH 2003-6, Decision No. 6, at *9 (5/14/04); Maryl Pacific, Case No. OSAB 2001-18, at *10. Moreover, "When a supervisory employee has actual knowledge of the condition as in this case, his knowledge is imputed to the employer and the [Director] satisfies her burden of proving knowledge without having to demonstrate any inadequacy or defect in the employer's safety program. An employer is charged with the knowledge of conditions which are plainly visible to supervisory personnel." D.W. Caldwell, Inc., 24 OSHC (BNA) 1658, at *12 (No. 12-1056 2013), (DWC) (Citations omitted); Dover Elevator Company, Inc. , 16 OSHC (BNA) 1281, at *21 (No. 91-862 1993); Director v. Dorvin D. Leis Co., Inc., Board Case No. OSH 2013-28, Order No. 582, at *6 (6/24/14) (*citing* A.P. O'Horo, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). "An employee who has been delegated authority over other employees, even if temporarily is considered to be a supervisor for the purposes of imputing knowledge to an employer." Teddy Moseley Painting, 24 OSHC (BNA) 1706, at *20 (*citing* A.P. O'Horo, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (No. 12-2154, 2013). Finally, the requisite knowledge for a serious safety violation has been found where the employer leaves an inexperienced employee unsupervised near a dangerous condition. Omaha Paper Stock Co. v. Sec'y of Labor, 304 F.3d 779, 784-85 (8th Cir. 2002) (*citing* Danco Constr. Co. v. Occupational Safety and Health Review Comm'n, 586 F.2d 1243, 1246-47 (8th Cir. 1978).

There is no dispute that Ramirez was the Hi-Power operations manager responsible for overseeing the project and the designated safety coordinator for the Hi-Power Solar Fall Protection Program responsible for safety and supervision of the work site and for detection of violations and compliance with and enforcement of the fall protection program. Based on the foregoing principles, the Board finds that Ramirez was a supervisor for purposes of fall protection, and his knowledge of the fall hazard is imputed to Hi-Power.

Hi-Power knew or should have known of the fall hazard created by employees being on a roof at the height of 11 feet, 3 inches. As stated, Ramirez was responsible for detecting violations, supervising, and ensuring compliance with the fall protection program on the work site. While Ramirez stated that when he was present on the work site, the three workers had their harnesses on and were tied off, there is no dispute that the investigation, including the statements of the Hi-Power workers, the photos, and Gosnell's observation of the work site, showed that there were no anchor points on the roof and none of the three employees were wearing their harnesses while working on the roof at the time of the investigation. Further, while denying knowledge that less than two weeks before this investigation Carvalho and Takahashi had received written warnings for not being tied, Ramirez, as safety coordinator, should have known of the violations and warnings. Even more significant, despite being the safety coordinator, Ramirez left Orr, a new hire, who received fall protection training on the day prior to the

investigation, unsupervised. Instead, Ramirez left the work site for another job and did not return until he was called back after Gosnell requested that management be called because there was no foreman present. Knowing that the three employees were working on roof in plain view and obviously hazardous, Ramirez should have provided supervision either by performing his own checks, or in his absence, assigning one of the workers on the work site to check that "everyone" was complying with the fall protection requirements. Instead, Ramirez designated "everybody" to be responsible for the fall protection policy and failed to designate anyone to oversee everyone despite his practice of correcting violations immediately on the spot. The Board acknowledges Hi-Power's argument and evidence of the extensive training and safety equipment, certification, and required safety meetings provided to its employees, regular site inspections, and discipline of all workers for safety violations. However, the Board does not agree with Hi-Power's assertion that "it was not reasonably foreseeable that the three employees would then violate the training instructions shortly thereafter." The Board concludes that Ramirez simply failed to provide adequate supervision, which is imputed to his employer Hi-Power.

Based on the foregoing, a violation of 29 CFR 1926.501(b)(1) is established by a preponderance of the evidence unless Hi-Power can prove its defense of unpreventable employee misconduct.

D. UNPREVENTABLE EMPLOYEE MISCONDUCT

At the trial and in Respondent's Post-Trial Brief, Hi-Power conceded that the three employees "were on the roof but not observing and not complying with the safety protocol and hundred percent tie off policy of Hi-Power." However, Hi-Power maintains that Gosnell's handwritten assessment of the oral statements of these workers was that they received and failed to comply with safety and fall protection training raising the defense of unpreventable employee misconduct.

In Director v. Kiewit Pacific Co., Board Case No. OSAB 94-009, at *8 (3/1/96), the Appeals Board articulated and acknowledged the defense of "unpreventable employee misconduct" as "an affirmative defense that an employer may assert to defend against a citation for noncompliance with safety standards." The Appeals Board further stated that the employer bears the burden of proving this defense by showing that the employer: (1) has established work rules designed to prevent the violation; (2) has adequately communicated these rules to its employees; (3) has taken steps to detect and correct violations, especially if there were incidents of prior non-compliance; and (4) has effectively enforced the rules when violations have been discovered. "In order for [the employer] to prevail on its unpreventable employee misconduct defense, [the employer] must demonstrate it took all steps necessary to prevent the noncomplying conduct of its employees. [The employer] must show that the action of its

employees was a departure from a work rule that the employer had effectively communicated to its employees and had uniformly enforced." Daniel Internat'l Corp., 9 OSHC (BNA) 1980 (No. 15690, 1981), at *11 (Daniel Corp.).

Based on the facts of this case, the Board concludes that Hi-Power failed to establish the affirmative defense of "unpreventable employee misconduct" because the third and fourth requirements of the affirmative defense were not met."

"Although an employer is not required to provide constant surveillance, it is expected to take reasonable steps to monitor for unsafe conditions. An effective program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" DWC, 24 OSHC (BNA) 1658, at *17 (Citations omitted). "An employer's steps to discover and correct safety violations are inadequate when unannounced inspections are infrequent and workers caught violating the rules are not consistently disciplined or penalized, because such steps are insufficient to deter future violations." Potelco, Inc. v. Dep't of Labor & Indus., 194 Wn. App. 428, 377 P.3d 251, 2016 Wash. App. LEXIS 1371 (Wash. Ct. App. June 13, 2016). Moreover, where an employer has work rules, but the employees do not always follow these rules shows a lack of uniform enforcement. Daniel Corp., at *11-12.

Although Hi-Power had safety policies requiring the use of fall protection, the employees did not always comply with these policies. Ramirez denied any actual knowledge of these prior February 5, 2015 violations of the fall protection policy by and the written warning given to Takahashi and Carvalho. Nonetheless, Ramirez, as operations manager and designated safety coordinator for the Hi-Power fall protection program, should have known about these prior violations and disciplinary actions. Further, Ramirez admitted knowing that safety violations, including the failure to tie off, were common, and he had a practice of making corrections "on the spot." He also knew that Orr was a new employee recently trained in fall protection. As discussed more fully above, Hi-Power did not take adequate steps to detect and correct violations. Ramirez should have been responsible for visiting the work site on a more "regular basis" and conducted more frequent unannounced inspections under these circumstances. Rather, Ramirez left the work site with the workers in plain view in an obviously hazardous situation without returning to check, or designate one of the workers on the work site to monitor that the workers were all complying with the fall protection requirements in his absence. Based on the recent prior violations of the fall protection policy, Ramirez should have made certain that the discipline imposed was effectively preventing repetition of the fall protection violations. In short, Hi-Power's procedure to discover its employees' disregard of its fall protection measures and to correct violations was not shown to be adequate, and the failure of these employees to comply with the fall protection policy demonstrates Hi-Power's lack of effective uniform enforcement. Therefore, the Board is compelled to find that Hi-Power failed to prove the

employee misconduct defense by failing to carry its burden of showing the third and fourth requirements.

E. REPEAT SERIOUS CLASSIFICATION

Hi-Power requests that the Board determine that the ISA for January 10, 2014 citation precludes the Director from characterizing the current Citation as a "repeat serious" violation of 29 CFR 1926.501(b)(1). In support, Hi-Power argues that, "[t]he plain, unambiguous and express terms of the Informal Settlement Agreement established that Hi-Power made no admission of liability and should be enforced[;]" and the doctrine of estoppel bars the Director from asserting that the 2013 incident and the 2014 citation furnished the grounds for a repeat violation ruling. At trial, Hi-Power further argued that the ISA was not a final order because even if the ISA is ambiguous, it should be construed against the HIOSH, the drafter; the ISA was not identified as a final order; and the ISA was a resolution and compromise, which is not evidence of wrongdoing and cannot sustain a repeat citation.

The Director has the burden of proving a violation of a standard by a preponderance of the evidence and where such violation is characterized as repeat serious, the additional burden set forth in HRS § 396-3. Interlake, Inc., 1979 OSAHRC LEXIS 522 *54, 1979 OSHD (CCH) P23, 571 (No.7-1462 1979) (ALJ); Director v. Frank Coluccio Constr. Co., Case No. OSH 2007-17, Decision No. 23, at *8 (1/25/08). "A violation is repeated if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation." Director v. Int'l Roofing & Bldg. Constr., Inc., Board Case No. 2007-6, Decision No. 22, at *8 (11/6/07) (*citing* Director v. Kiewit Pacific Co., OSAB 94-009 (3/1/96).

The "repeat serious" characterization issue rests on whether the ISA was a final order against Hi-Power. To resolve this issue, the Board turns to a review of the relevant ISA provisions, which provide as follows:

> The undersigned Employer and the Director of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division (HIOSH), in settlement of the citation(s) and penalties, issued on January 10, 2014, as a result of the above inspection hereby agree as follows:
>
> 1. The Employer and Director agree that the citation(s) and penalties are amended as follows:

Citation 1, Item 1	Penalty reduced to	$400.00
Citation 1, Item 2	Penalty reduced to	600.00
Citation 2, Item 1	Abatement extended to 3/1/14	0.00
	TOTAL	$1,000.00

2. The penalty reduction is in consideration of the Employer's prompt abatement of the violations and the efforts to prevent future reoccurrence. The Employer agrees to contact the Consultation and Training Branch (586-9100) to schedule a visit to at least one of its job sites by August 2014.

3. The Employer, by signing this Settlement Agreement, hereby waives its rights to contest the original citation(s) and penalties, and as amended in this agreement.
***

6. By entering into this agreement, the Employer does **not admit** that it violated the cited standards for any litigation or purpose other than a subsequent proceeding under the Hawaii Occupational Safety and Health Law.

7. The Employer agrees and understands that if employer fails to comply with each and every term of this agreement, this agreement shall be null and void upon written notice by the Director and the original citation(s) and penalties issued on January 10, 2014, **shall become a final order**.

8. The Employer agrees:

   a. to pay the assessed penalties as modified herein within 20 days of the date this agreement is executed; and,
   b. to pay reasonable attorney's fees and costs if the employer defaults on the payment of the penalties and Director institutes legal action to recover the unpaid penalties.

9. If this Settlement Agreement is not executed and returned to HIOSH by February 4, 2014, then the citation(s) and penalties issued on January 10, 2014, **will become a final order** of the Director of the Department of Labor and Industrial Relations. Please make sure you allow sufficient time for mailing.

10. This Settlement Agreement should be considered as **an order** of the Director of the Department of Labor and Industrial Relations.

(Underlining and bolding added)

The Director argues that the provision (paragraph 6) has been used in settlement agreements by federal OSHA and HIOSH to prevent the use of the agreement in civil suits to prove liability and permit the Secretary and the Director to use the agreement as a basis for repeat violations in future cases. At trial, the Director took the position that once the ISA is signed, the ISA, not the citation, became the final order; that the repeat violation is based on the citation as amended by the ISA; and that the ISA became a final order twenty days after being

signed when the appeal period ended. In support, the Director relied on the language in Paragraph 6 that states "other than a subsequent proceeding under the Hawaii Occupational Safety and Health Law."

The Board does not find the Director's arguments compelling for the following reasons. After review of the record and the Director's Post-Hearing Memorandum, the Board notes that the Director fails to cite any legal authority supporting her assertions that twenty days after the agreement was signed, the ISA became a final order upon which a repeat violation may be rendered.

In addition, the Board concludes that Paragraph 6, the provision creating the exception for a subsequent HIOSH proceeding, is ambiguous at best regarding the reference to subsequent HIOSH proceedings. More specifically, it is unclear whether this exception refers to subsequent proceedings regarding the specific citation addressed by the ISA or future HIOSH citations. The Board notes that HRS § 396-14 provides:

> **§396-14 Evidence.** No record or determination of any administrative proceeding under this chapter or any statement or report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than an action for enforcement or review under this chapter.

The Board construes HRS § 396-14 to also preclude the signing of the ISA from being used or as an admission by the employer of a violation in a subsequent proceeding. HRS § 396-14 is broad and more explicit, however, in extending its prohibition against the admission or use to any civil action "other than an action for enforcement or review under this chapter [Chapter 396]." (Emphasis added) Under HRS § 396-14, the exception applies only to actions for enforcement or review under Chapter 396. Accordingly, from the face of this provision, there is nothing that allows the signing of an informal settlement agreement to be used as an admission of a violation for purposes of a repeat violation. The Board reasons that because the ISA is ambiguous, Paragraph 6 should be interpreted consistently with HRS § 396-14.

The Board concludes that contrary to the Director's position, based on its terms, the ISA is not a "final" order. Paragraphs 7 and 9 set forth two specific circumstances in which the ISA is not legally binding on the parties and the original citation and penalties issued on January 10, 2014 "become a **final order**." The first one is under Paragraph 7., if the employer fails to comply with "each and every term of this agreement"; and the second is under Paragraph 9., if the ISA is not executed and returned to HIOSH by February 4, 2014. There is nothing similar in

the ISA explicitly providing for the ISA to become a final order if the employer signs and complies with the ISA terms. In fact, Paragraph 10 unequivocally provides that the ISA "should be considered as an '**order**' of the Director," as opposed to a "**final** order" of the Director. This interpretation of the ISA as an "order," rather than a "final order" is consistent with Paragraph 6. providing, "By entering into this agreement, the Employer does **not admit** that it violated the cited standards…." The Board further notes that an interpretation that the ISA as a final order, which can be used as the basis for a repeat violation, obviously creates an unfair and unequal benefit for HIOSH and a significant disincentive for Hi-Power to sign the ISA. This interpretation of the ISA as a "final order" is obviously detrimental to the employer because despite its finality, the employer, by signing the ISA, has waived the right to contest the ISA in accordance with HRS § 396-11(a) under Paragraph 3 of the ISA.

Finally, the Board adheres to the well-recognized principle that, "Any ambiguities in an [agreement] should be interpreted most strongly against the party who has drafted the language where an [agreement] is open to more than one reasonable construction." Santiago v. Tanaka, 137 Hawaii 137, 156, 366 P.3d 612, 631(2015); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 110 n. 5, 839 P.2d 10, 25 n. 5 (1992). Accordingly, the Board interprets this ambiguity contained in the ISA against HIOSH, as the drafter, and holds pursuant to its authority under HRS § 396-11(i), that the ISA was not a final order upon which the repeat serious violation of can be based, and that the characterization of the violation of 29 CFR 1926.501(b)(1) as "repeat-serious" was erroneous. The appropriate characterization for this violation is "serious." The Board is mindful of the standard for review according deference to HIOSH. However, this issue involves conflicts over interpretation of an ambiguous ISA and not an ambiguous regulation or statute. Consequently, the Board takes the position that HIOSH's interpretation of the ISA is not entitled to the deferential abuse of discretion standard of review. The Citation is affirmed as to the violation of 29 CFR 1926.501(b)(1), but reversed as to the characterization of the violation as "repeat-serious" and the imposition of the proposed penalty.
.

F. DUE PROCESS

Finally, the Board rejects Hi-Power's position that the Director's withdrawal of Citation 1, item 1 and amendment of the penalty associated with Citation 1, Item 2 at trial were based on "unlawful procedure" and Hi-Power's due process rights to adequate notice.

The United States Constitution Article XIV, § 1 provides in relevant part, "…nor shall any State deprive any persons of life, liberty, or property, without due process of law[.]" The Hawaii State Constitution contains an analogous provision Article I, § 5 "No person shall be deprived of life, liberty or property without due process of law[.]"

The Board concurs with Hi-Power that it would have been more appropriate for the Director to provide notice to Hi-Power and the Board of the withdrawal of the first item and the lowering of the penalty associated with the second item of the Citation before the trial to narrow the focus of trial preparation. However, Hi-Power failed to demonstrate that the withdrawal and the decrease in the penalty constitute a deprivation of its "life, liberty, or property" under either the federal or state Constitutions. More specifically, while noting that Hi-Power likely expended more time and resources in its preparation to challenge the Citation than it would have with the pre-trial knowledge of the Director's action, the Board is unable to find that there is sufficient prejudice and deprivation of property to constitute a lack of due process of law because the Director's action was to withdraw Citation 1, item 1 and amend the penalty associated with Citation 1, Item 2 to reduce the amount from $4,400 to $2,800,.

ORDER

1. The Board approves the Director's withdrawal of Citation 1, Item 1 alleging the violation of 29 CFR 1926.503(c).

2. Regarding Citation 1, Item 2, the Board affirms the violation of 29 CFR 1926.501(b)(1), reverses the characterization of "repeat-serious," and modifies the characterization to "serious," and remands the proposed penalty to the Director for further proceedings and determination. Based on the Director's reduction of the proposed penalty for a "repeat" violation of 29 CFR 1926.501(b)(1) from $4,400 to $2,800 at trial, the Board orders that any proposed penalty on remand for the "serious" violation be less than the $2,800 imposed for the "repeat" serious violation.

DATED: Honolulu, Hawaii, June 29, , 2017.

HAWAII LABOR RELATIONS BOARD

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies to: Brian G.S. Choy, Esq.
Herbert B.K. Lau, Deputy Attorney General

[i] Regarding Exhibits C-4 and C-5, the videotape recording and the written transcript of the deposition of Nicholas Gosnell (Gosnell), Respondent requested clarification that Gosnell should not be considered an expert witness because he was not qualified on the record and Director's counsel refused to provide the material provided to Gosnell by the Director in preparation for his oral deposition, which Gosnell had agreed to provide at the deposition. The Director asserted that Gosnell was being offered as a percipient rather than an expert witness, who would testify regarding his observations on the date of the inspection but also as an occupational safety health compliance officer. The Board ruled that Gosnell would be qualified "as an expert in the designated field" and regarding the exhibits, would "take into consideration and let it go the weight of the evidence [sic] the objection of the Respondent."

[ii] Ramirez distinguished the operations manager from the foreman based on the fact that the operations manager is able to oversee the project.

[iii] Gosnell is no longer employed by HIOSH.

[iv] Ramirez testified that there were anchor points on the roof because he helped install these anchor points, which were not visible because of their placement under the shingles. Ramirez's testimony conflicts with the other evidence in the record, including the testimony of two of the employees involved in the incident. Even if Ramirez is correct that anchor points were in place on the roof at the time of the investigation, the fact remains that the three employees were not tied off.

[v] The Citation alleged that, "Three employees were exposed to a fall of at least 10 feet onto grass below due to the lack of conventional fall protection while working on the roof serving solar panels. The employees were exposed to serious bodily injury."

[vi] Hawaii Revised Statutes §396-3 defines "Employer" as:

> "Employer" means:
> (1) The State and every state agency;
> (2) Each county and all public and quasi-public corporations and public agencies therein;
> (3) Every person which has any natural person in service;
> (4) The legal representative of any deceased employer;
> (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

[vii] HRS § 91-14(g) provides:

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.