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Case No. OSH 2018-04

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and LEAKMASTER INC., Respondent.	CASE NO. OSH 2018-04 (Inspection No. 1284958) DECISION NO. 38 FINDING OF FACTS, CONCLUSIONS OF LAW, DECISION AND ORDER

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

Any conclusion of law that is improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. PROCEDURAL HISTORY

On February 7, 2018, Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), through the Hawai‘i Occupational Safety and Health Division (HIOSH), issued a Citation and Notification of Penalty (Citation) to Respondent LEAKMASTER, INC (Respondent or Leakmaster). The Citation resulted from Inspection No. 1284958, which was conducted on December 19, 2017. Citation 1 Item 1 of the Citation alleged a “Repeat-Serious” violation of 29 CFR 1926.501(b)(10) [12-110-50(a), HAR] (employees working without an adequate fall protection system) and imposed a penalty of $31,500.00.

Respondent contested the Citation by a letter dated and delivered on February 27, 2018. On March 8, 2018, HIOSH transmitted the Notice of Contest, dated March 8, 2018, to the Hawai‘i Labor Relations Board (Board). On March 9, 2018, the Board notified the Parties of receipt of the Notice of Contest and scheduled an initial status conference, a notice of the *de novo* hearing, as well as other deadlines and cutoff dates.

On April 20, 2018, the Board held an initial status conference.

On May 2, 2018, the Board issued Order No. 985 scheduling the date for the *de novo* hearing, as well as other deadlines and cutoff dates.

On July 26, 2018, the Board held a pre-trial conference.

On July 31, 2018, the Parties submitted a Stipulation of Facts (Stipulation), which was subsequently ordered by the Board on August 1, 2018 through Order No. 1016.

On August 1, 2018, the Board conducted the *de novo* hearing. At the trial, the Board heard testimony from one of Leakmaster, Inc.'s partners, Mr. Joel Nakayama (Nakayama) and a manager at Leakmaster, Inc., Mr. Ty Boughton (Boughton). In addition to the documents previously entered into the record, the Board accepted the Director's Exhibit 4 into the record, stipulated into evidence by the parties.

Based on the record in this case, the sole issue to be determined is whether the affirmative defense of "unforeseeable employee misconduct" is applicable to this case, negating the violation.

II. FINDINGS OF FACT

The Board accepts the following fact stipulated to by the Parties:

Respondent does not contest the validity of Citation 1, Item 1 of HIOSH Inspection 1284958, which cites a repeat-serious violation of 29 CFR 1926.501(b)(10) [Section 12-110-50(a), HAR] and assesses a penalty of $31,500.00.

The December 19, 2017 Incident and Investigation

The Board accepts the following facts stipulated to by the Parties:

Respondent was contracted by "Extra[ ]Space Storage to apply a high grade CFR silicone to the roof of [the four-story] building located at [94-]130 Leokane Street, Waipahu, Hawai'i 96797" (Building). At all relevant times in the instant case, Respondent maintained a worksite at the Building (Worksite). The Building's flat roof is approximately 48 feet above the concrete ground.

On December 19, 2017, HIOSH Inspector Darrell Suzuki (Inspector Suzuki) conducted an occupational safety inspection (Inspection No. 1284958). At this time, Inspector Suzuki observed three Leakmaster employees applying silicone coating to waterproof the entire roof of the building. Moloikaialiilani Kai Akau (Akau) was one of these three employees and was the foreman at the Worksite.

Inspector Suzuki observed that Akau was not wearing fall protection while on the roof of the Worksite. Specifically, although Akau was wearing a fall protection harness, his harness was not attached to the retractable lanyard, so he was not tied off.

While Akau was not wearing fall protection, Inspector Suzuki observed Akau walking from one end to the other end of the roof of the Worksite while carrying a five-gallon bucket in his hand and observed Akau sitting at the edge of the Building, applying the silicone coating with a roller on the edge of the roof, 48 feet above the ground. Akau verbally admitted to Inspector Suzuki that he was not properly tied off and that he knew he needed to be tied off.

On February 7, 2018, the Director, through HIOSH, issued the Citation against Respondent. Citation 1, Item 1 of the Citation alleged a "repeat serious" violation of 29 CFR 1926.501(b)(10) [section 12-110-50(a), HAR] and proposed a penalty of $31,500.00.

In calculating this penalty, HIOSH initially determined the severity of the most serious potential injury and the probability of an injury occurring from the cited hazardous condition or practice to determine the gravity-based penalty.

HIOSH gave the Citation a severity level of "high" based on the most serious potential injury that could be sustained if an employee fell from the roof (e.g., death, broken bones requiring hospitalization, and/or resulting in permanent disability). The HIOSH investigator gave the Citation a probability of "greater" because he judged the likelihood of an accident to be relatively high based on the distance from the edge of the roof to the ground (48 feet) and the foreman's location working at the edge of the roof.

Based on the combination of "high" severity and "greater" probability, HIOSH calculated a gravity-based penalty of $7,000.00. However, HIOSH reduced the gravity-based penalty by 10% due to the size of the company, making the new gravity-based penalty $6,300.00.

HIOSH then multiplied this gravity-based penalty by a factor of 5 based on Respondent's prior violation, leading to the adjusted penalty of $31,500.00.

The Board additionally finds:

Akau was a Project Supervisor for Leakmaster (*see* Respondent Leakmaster Inc.'s Witness List) and was running the Worksite. (*See* Investigator's Report, Leakmaster, Inc. 107, HOM) In this position, Akau was the leader of the Worksite and was responsible for the other Leakmaster employees at the Worksite.

Previous Incidents and Citations

The Board accepts the following facts stipulated to by the Parties:

Since 2015, Respondent has been cited by the Director for violating 29 CFR 1926.501(b)(10) three prior times in Inspections Nos. 1225753, 1140337, and 1061744.

On July 16, 2015, the Director issued a citation, classified by the Director as "serious," to Respondent based on Inspection No. 1061744, conducted at Respondent's worksite at 1311 N. King Street, Honolulu, Hawai‘i 96817. This citation listed a violation of 29 CFR 1926.501(b)(10)

[Section 12-110-50(a), HAR] as Citation 1, Item 2. On August 27, 2015, Respondent and Director agreed to an ISA regarding this citation.

On May 31, 2016, the Director issued a citation, classified by the Director as "repeat-serious," to Respondent based on Inspection No. 1140337, conducted at Respondent's worksite at 3460 Pawaina Street, Honolulu, Hawai'i 96826. This citation listed a violation of 29 CFR 1926.501(b)(10) [Section 12-110-50(a), HAR] as Citation 1, Item 1. Respondent did not contest the citation and paid the penalty in full. On June 20, 2016, the citation became a final order.

On May 23, 2017, the Director issued a citation, classified by the Director as "repeat-serious," to Respondent based on Inspection No. 1225753, conducted at Respondent's worksite at 84-1170 Farrington Highway, Waianae, Hawai'i 96792. This citation listed a violation of 29 CFR 1926.501(b)(10) [Section 12-110-50(a), HAR] as Citation 1, Item 2. On June 13, 2017, Respondent and Director agreed to an Informal Settlement Agreement (ISA) regarding this citation.

Leakmaster Fall Protection Program and Policies

The Board finds as follows:

Leakmaster has in place an Injury & Illness Prevention Plan (IIPP) as well as a Fall Protection Plan (FPP). Leakmaster also has a "100% tie off policy." At least some of the language in the FPP mirrors the OSHA standards, and copies of the IIPP and the FPP are available to Leakmaster employees by being placed in their trucks, which they take to jobs.

Before a Leakmaster employee is allowed to work on a site, they must pass a fall protection quiz. Each month, Leakmaster holds meetings to go over the IIPP with its employees. Leakmaster always schedules the FPP as the first issue to be reviewed with its employees at these meetings. When employees attend these meetings, they print and sign their names on a sign-in sheet to document their attendance. Employees are also required to annually certify their knowledge of fall protection safety standards.

The Superintendent of Leakmaster is tasked with regularly checking on the worksites and tries to check each site daily. When the Superintendent checks a worksite, he sometimes fills out a "Job Progress Form" which includes, among other things, the progress of the job, the need for any additional materials, and the safety conditions at the site.

The estimators, including Boughton, check sites as they feel necessary or when they are around a worksite. Estimators may also check on worksites of their own accord. Estimators will sometimes send emails to Leakmaster regarding what they observe at the worksites. The delivery drivers for Leakmaster will also review the safety at the worksites when they deliver materials.

Leakmaster Discipline

Leakmaster's employment agreement contains a disciplinary policy, including information regarding a progressive discipline process. The progress discipline process includes references to verbal warnings and written warnings, a performance improvement plan, among other things.

The disciplinary policy in the IIPP differs from the disciplinary policy in Leakmaster's employment agreement and contains three "steps" for repeated infractions (Step 1 is a verbal warning, Step 2 is a written warning, and Step 3 is possible suspension or discharge). The IIPP's disciplinary policy also includes two classes of violations, but it does not detail the disciplinary differences between the two violations.

Leakmaster uses progressive discipline program forms to document disciplinary infractions. These forms include the type(s) of discipline, including verbal/oral warnings, written warnings, suspension, and termination.

In determining appropriate discipline for employees, Leakmaster considers factors including the employee's experience, their position, and their personal situation, including their cultural background and/or their financial status.

Training, Certification, and Prior Discipline of Akau

Akau received his yearly certification in fall protection safety standards in August of 2017. He was also present at the safety meetings held by Leakmaster in September, October, November, and December of 2017, all of which preceded the violation in the instant case. Prior to the December 19, 2017 incident, Akau had not received any disciplinary infractions.

III. STANDARD FOR REVIEW

Hawai'i Revised Statutes (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, an agency's statutory interpretation is reviewed *de novo*. Dir. Dept. of Labor and Indus. Relations v. Kiewit Pacific Co., 104 Hawai'i 22, 28, 84 P.3d 530, 536 (App. 2004).

IV. STIPULATED CONCLUSIONS OF LAW

The Board accepts the following conclusions of law stipulated to by the Parties and incorrectly designated as facts:

The Board has jurisdiction over this contested case under HRS § 396-11.

At all relevant times, Respondent was an employer, as defined in HRS § 396-3, employed employees, as defined in HRS § 396-3, and was subject to the requirements of HRS Chapter 396, the Hawai‘i Occupational Safety and Health Law. A violation of this Chapter was committed.

Given that, if Akau had fallen from the roof of the worksite in the instant citation, there was a substantial probability that death or serious bodily injury would have resulted (e.g. “amputations, paralysis, f[r]actures, [or] lacerations”), the above-mentioned violation was a serious violation.

The formula used to calculate the $31,500.00 penalty in the Citation was in accordance with the applicable law/guidelines and HIOSH’s standard policies and procedures. The gravity-based penalty used as part of this calculation can be reduced by certain mitigating factors, for example, the size of the Respondent, “good faith,” and the Respondent’s prior citation history; for a second or subsequent violation, this penalty is multiplied by five.

The OSHA standard violated in Citation 1, Item 2 in HIOSH Inspection No. 1225753; Citation 1, Item 1 in HIOSH Inspection No. 1140337, and Citation 1, Item 2 in HIOSH Inspection No. 1061744 is the same OSHA standard violated in the instant case. All of these citations (including the instant citation) involve the same or a substantially similar condition or hazardous practice.

V. ADDITIONAL CONCLUSIONS OF LAW

At the *de novo* hearing and in the Stipulation of Facts, the Parties agreed that a “Repeat-Serious” violation of 29 CFR 1926.501(b)(10) [12-110-50(a), HAR] occurred on December 19, 2017 at the Worksite.

Although the Respondent stipulated to this “Repeat-Serious” violation, and the Board accepts this stipulation, the Board makes the following notes. The Board’s conclusion that this violation was correctly classified as “Repeat-Serious” is based on the fact that Respondent did not contest the citation issued on May 31, 2016 and paid the penalty in full, and the citation became a final order on June 20, 2016, and the fact that the “Repeat” consideration of the violation is based on at least one prior violation.

However, as the Director is well-aware, the Board ruled in Decision 34A, Director, Dep’t of Lab. and Ind. Relations v. Hi-Power Solar, Board Case No. OSH 2015-34 (11/24/17), that an ISA is not a final order and thus cannot be the basis of a “repeat-serious” violation. Whether an ISA is a final order or not is not an appropriate factual finding; rather, it is a legal conclusion, and one that the Board has rejected. The Board will not hold that an ISA is a final order of the Director upon which a repeat violation can rest.

In the instant case, while the Director issued three prior citations to Respondent, two of those citations were settled via ISAs and thus did ***not*** become final orders. Therefore, they cannot

be used to classify a future citation as "repeat."[i] However, in this case, as stated above, based on the specific facts at hand, namely the May 31, 2016 citation that did become a final order because Respondent did not contest the citation and the citation was not settled through an ISA, the Board finds that the "repeat-serious" classification was accurate.

As the parties have stipulated that the violation occurred and the citation was accurate, the only issue before the Board is whether Respondent's affirmative defense of unpreventable employee misconduct succeeds, negating the employer's liability for the citation.

The defense of "unpreventable employee misconduct" is "an affirmative defense that an employer may assert to defend against a citation for noncompliance with safety standards." Director v. Kiewit Pacific Co., Board Case No. OSAB 94-009 at *8 (3/1/96) (Kiewit). The employer bears the burden of proving this defense by proving: (1) it 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." *Id*. In other words, to succeed in this affirmative defense, the employer must show that "the violative conduct on the part of an employee was a departure from a uniformly and effectively communicated and enforced work rule." Mosser Construction Co., 15 OSHC (BNA) 1408 at *24 (No. 89-1027, 1991) (Mosser). Additionally, because a supervisory employee was involved in the violation, the employer's burden of proof is greater, and the defense is more difficult to establish. Archer-Western Contractors, Ltd., 15 OSHC 1013 at *17 (No. 86-1067, 1991) (citations omitted) (Archer-Western).

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

Supervisory Employee

"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 is strong evidence that the employer's safety program was lax." Archer-Western, 15 OSHC 1013 at *17. 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. *Id.* at *16.

Although the simple fact that Akau was named as the foreman and Project Supervisor is not sufficient to classify him as a supervisory employee, when an employee is "vested with some degree of authority over the other crew members assigned to carry out the specific job involved…This is an adequate basis for finding that the temporary working foreman was a supervisory employee for purposes of this case." Iowa Southern Utilities Co., 5 OSHC (BNA) 1138 at *5 (No. 9295, 1977).

The Parties have stipulated to the fact that Akau was the foreman at the Worksite. As Akau was the person in charge, even though he was not a person who would have management authority at Leakmaster, he was a supervisory employee for the purposes of this case. Leakmaster identified Akau as the leader at the Worksite and stated that he was responsible for the other people at the Worksite. Therefore, due to the supervisory employee's involvement in the violation, the burden of proof that Respondent must meet to prove unpreventable employee misconduct is higher, and the defense is more difficult to establish.

Establishment of Work Rules

To prove the establishment of work rules, the employer must show that it has work rules that are designed to prevent the unsafe condition or violation of the OSHA standard. Mosser, 15 OSHC (BNA) 1408 at *27-28.

Leakmaster's FPP is comprehensive and serves as an addition to the IIPP that is distributed to its employees and is accessible at the job site by being part of the tools provided to the employees in their trucks. The FPP describes how safety belts and harnesses are to be used, including the instruction that they should be used "in such a way as to permit an[] accidental fall of no more than six feet" (Respondent's Exhibit B.) and includes language directly from OSHA's standards.

The Board notes, however, that Leakmaster's disciplinary policy in the IIPP, including its progressive disciplinary process, differs from the disciplinary policy outlined in the employment agreement given to Leakmaster employees. The fact that the policies are inconsistent could confuse employees as to what discipline they would face depending on their offence. Additionally, the IIPP contains distinctions between violations (Class I and Class II), but the IIPP does not explain what the difference between a Class I and a Class II violation would be in terms of discipline.

While this confusion is understandable, it does not alter the fact that the established work rules are sufficient to pass the test for the first factor of unpreventable employee misconduct. The issues surrounding the confusion due to the policies will be addressed further in the fourth factor below.

Communication of the Fall Protection Policy

The employer is required to effectively communicate the work rules regarding the unsafe condition to its employees. Kiewit at *8.

To ensure employee compliance with the IIPP and the FPP, Leakmaster holds monthly safety meetings where the FPP is always scheduled. Leakmaster requires that employees obtain annual certification in fall protection and that employees pass a fall protection quiz before being allowed to work on a site. Additionally, Leakmaster places the IIPP and the FPP in the trucks that the employees take to the jobs, so it is easily accessible to employees.

As stated above, due to the supervisory employee's involvement, the employer must show that there was adequate instruction of the FPP to meet the burden of proof for this element. Archer-Western 15 OSHC 1013, at *16.

In this case, Akau was present at the monthly meetings for the four months prior to the instant incident, and fall protection was covered at each of those meetings. Akau was certified in fall protection safety standards in August of 2017, a few months prior to the incident. He also passed the fall protection training quiz given to him by Leakmaster. Based on the evidence, Leakmaster provided adequate instruction of the FPP and communicated its work rules to its employees.

Steps to Detect and Correct Violations

While employers are not required to provide constant surveillance of their employees to show that they have taken appropriate steps to detect and correct violations, employers are expected to take "reasonable steps to monitor for unsafe conditions." D.W. Caldwell, Inc., 24 OSHC (BNA) 1658 at *17 (No. 12-1056, 2013) (Citations omitted) (DWC). To meet these standards, employers are required to make "a diligent effort to discover and discourage violations of safety rules by employees." *Id.* An employer's steps to detect and correct safety violations are not adequate when surprise or unannounced inspections are infrequent. Hi-Power Solar, LLC, Board Case No. 2015-34, Decision No. 34 at *14 (6/27/17) (Citations omitted) (Hi-Power Solar). Further, due to the supervisory employee's involvement in the instant citation, the employer must show that it provided adequate supervision. Archer-Western, 15 OSHC 1013 at *17.

In DWC, the employer's method of visiting the projects to check on fall protection was found to be inadequate to detect and correct violations, even though the projects were visited on a "regular basis." When the employer visited the project, he did not perform a complete safety inspection of the crew following a checklist or other guideline, and he did not record his visits unless there was an issue. Additionally, the frequency of inspections was based on the worksite's proximity to the company office, how often the company needed to deliver materials, and how often the company needed to check on the progress of the work. DWC, 224 OSHC (BNA) 1658 at *17-18.

Leakmaster sends its Superintendent to check on the worksites regularly and attempts to check each site daily. However, as in DWC, the Superintendent does not perform a complete safety inspection of the crew based on a checklist or other guidelines and visits are not always recorded. The form that the Superintendent is called upon to fill out when he does record his visit is entitled "Job Progress Form," and it includes information regarding the progress and needs of the job as well as the safety information. The form's primary purpose, according to its title, is to assess the progress of the job, not to check on specific aspects of safety.

The other Leakmaster employees who visit the worksites and perform checks on the safety at the worksites also do not follow a checklist or other guideline for safety. They do not consistently record their inspections of the sites. Their visits to the worksites are based on their

proximity to the site, their need to check on the job progress, and/or their need to deliver materials to the site. Additionally, some of the employees who visit the worksites do not even go into the site itself when inspecting.

In the instant case, there is no documentary evidence that the Superintendent or any of the other employees who visit the worksites inspected the Worksite. There is no documentary evidence to show that Leakmaster had any individual go to the Worksite to supervise the lead employee at any point during this job prior to the incident.

The Board recognizes that Leakmaster has taken steps to ensure that they check their worksites regularly. However, when the visits are made without the primary focus of performing a safety inspection, when the visits are not recorded, when many of the visits to the worksites are based on factors other than the need to perform random safety inspections, and when a job goes on for several days without any documented supervision, those visits do not rise to the required level of detecting violations.

Therefore, Leakmaster does not meet the third element of the unforeseeable employee misconduct affirmative defense.

Effective Enforcement of Work Rules

The employer has the responsibility of strictly enforcing their work rules regarding safety violations. Mosser 15 OSHC (BNA) 1408 at *15. When workers who violate the rules are not consistently disciplined or penalized, the employer's enforcement is inadequate. Hi-Power Solar, Decision No. 34 at *14. If an employer has work rules but the employees do not always follow these rules, then the lack of adherence to the rules shows a lack of uniform enforcement. Daniel Internat'l Corp., 9 OSHC (BNA) 1980 at *11 (No. 15690, 1981).

As reviewed above, Leakmaster has a set of work rules for safety violations that meets the standards required. However, the two disciplinary policies that Leakmaster has are inconsistent, which could provide employees with some confusion about what disciplinary actions would be taken for a violation. For example, the employment agreement references a "performance improvement plan" as a potential disciplinary option that is not referenced in the IIPP. Despite the potential confusion, the inconsistencies in the disciplinary policies are not the primary issue regarding Leakmaster's enforcement.

The main concern about Leakmaster's enforcement of its work rules comes from its enforcement. According to the IIPP, Leakmaster's company disciplinary policy, "will be dealt with in a firm, fair[,] and consistent manner." The steps include 1) verbal warnings, 2) written warnings, and 3) potential suspension or termination.

However, not only are Leakmaster's policies inconsistent with one another, but the enforcement of Leakmaster's policies are inconsistent with either written company disciplinary policy. According to the Progressive Discipline Program Forms submitted to the Board,

Leakmaster combines its discipline for certain infractions into a single step, rather than the stated three steps.

Further, Nakayama, Leakmaster's primary disciplinarian, admits that the discipline given to employees varies based on experience, position, and personal situation. Nakayama notes that certain employees may have cultural or personal financial issues that impact the type of discipline he chooses to issue to them.

While the Board recognizes the human side of making such disciplinary decisions, the law requires that discipline for OSHA violations be uniformly applied to meet this element of effective enforcement. While the law may permit a company to hold employees in different positions to various standards (e.g., one standard for apprentices, one for journeymen, one for supervisors, etc.) when it comes to OSHA regulations, other considerations may not be clear or certain to other employees. When the reason for variance in discipline for violations of OSHA regulations is unclear or uncertain to other employees, the enforcement of discipline is inadequate to meet the fourth element of unavoidable employee misconduct.

VI. ORDER

For the reasons discussed above, the Board orders that the Citation and Notification of Penalty resulting from HIOSH Inspection Number 1284958, conducted on December 19, 2017 and issued on February 7, 2018, including the "repeat-serious" characterization of the violation and the penalty of $31,500.00, is hereby AFFIRMED. This case is closed.

Dated: Honolulu, Hawai'i, October 22, 2018.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chairperson

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

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[i] Based on this reasoning, it is the Board's position that Respondent's May 31, 2016 violation should not have been classified as "repeat-serious" but should have been classified as "serious" because the July 16, 2015 violation was settled through an ISA and thus did not become a final order. However, as that violation was not contested, the Board merely notes this fact for the record.