STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and DORVIN D. LEIS CO. INC., Respondent.	CASE NO. OSH 2013-28 ORDER NO. 582 ORDER DENYING RESPONDENT DORVIN D. LEIS CO., INC.'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF STATUS CONFERENCE

ORDER DENYING
RESPONDENT DORVIN D. LEIS CO., INC.'S MOTION FOR SUMMARY JUDGMENT

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

A. Notice of Appeal and Citation

This appeal arises from a Citation and Notification of Penalty (Citation), issued on October 3, 2013 to Respondent Dorvin D. Leis Co., Inc. (DDL or Respondent) based on Inspection No. 316270248 (Inspection), conducted on April 16, 2013. In an October 18, 2013 letter to HIOSH Administrator Diantha Goo (Goo), DDL attorney Gregory M. Sato (Sato) indicated that DDL was contesting "all parts and subparts of the citation and to the penalties assessed for each."

On November 7, 2013, the Hawaii Labor Relations Board (Board) received a "Notice of Contest" from the Hawaii Occupational Safety and Health Division (HIOSH) of the Department of Labor and Industrial Relations, State of Hawaii notifying the Board that Respondent was contesting that Citation. The Citation and Notification of Penalty attached to the Notice states:

Citation 1 Item 1 Type of Violation: SERIOUS
29 CFR 1926.501(b) (1) [Refer to chapter 12-110-50(a), HAR] was violated because:

Two employees installing metal duct work on a roof with an unprotected side that was 25 feet above the lower level did not have their lanyards attached to a lifeline. The lack of fall protection exposed the employees to potential serious injuries due to fall hazards.

29 CFE 1926.501(b) (1) states "Unprotected sides and edges. 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 guardrails systems, safety net systems, or personal fall arrest systems."

Location: Main building roof

The Citation further indicates the date by which the violation must be abated as October 7, 2013; and that the penalty was for $1,375.00.

At the initial conference/settlement conference held on December 18, 2013, the Board set the following filing deadlines: March 18, 2014 for motions; April 22, 2014 for oppositions to motions; and May 6, 2014 for replies.

B. Motion for Summary Judgment

On March 18, 2014, the Respondent filed "Respondent Dorvin D. Leis Co., Inc.'s Motion for Summary Judgment" (Motion). In the Memorandum in Support of Motion (DDL Memorandum), DDL asserts that HIOSH [the Director of Labor and Industrial Relations] has not met its [his] burden of proving that DDL violated 29 CFR § 1926.501(b)(1) because it [he] cannot prove by a preponderance of the evidence that DDL knew or should have known that the two employees involved, Bobby Estrella, Jr. (Estrella) and Kris Bibo [sic] (Bio),[1] would violate the Fall Protection standard on the day of the Inspection. More specifically, DDL asserts that the Complainant Director of Labor and Industrial Relations (Director or Complainant) failed to show evidence of DDL's actual knowledge because: 1) when HIOSH Compliance Safety Officer Charles Clark (Clark) learned that Estrella was a "foreman," he ceased his inquiry and failed to conduct a "thorough and effective investigation" in accordance with HIOSH Field Operations Manual (FOM) guidelines to gather evidence to determine whether Estrella had the authority to "direct[], manage[], control or [had] custody of any employment, place of employment, or any employee" set forth in the definition of "employer' under §396-3, Hawaii Revised Statutes (HRS);" and 2) Estrella was a journeyman member of the Sheet Metal Workers Union, Local 239 (Union); accordingly, Estrella was not a "supervisor" within the meaning of the National Labor Relations Act (NLRA) §2(11).

On April 22, 2014, the Director filed "Complainant Director of Labor and Industrial Relations' Memorandum in Opposition to Respondent Dorvin D. Leis Co., Inc.'s Motion for Summary Judgment, Filed on March 18, 2014" (Director Memorandum).While concurring that the significant issue is whether the Respondent had knowledge of the violative condition, the Director asserts that DDL is not entitled to summary judgment. The Director argues more particularly that: 1) foreman Estrella's actual knowledge of the Fall Protection violation is imputed to DDL; and 2) a genuine issue of material fact exists regarding whether Estrella had

[1] See note 3 below.

supervisory authority on the day of the Inspection to represent DDL by directing the work site and Bio in accordance with §396-3, HRS .

On May 6, 2014, DDL filed "Respondent Dorvin D. Leis Co. Inc.'s Reply Memorandum in Support of Its Motion for Summary Judgment" (Reply). In its Reply, DDL responds that summary judgment is warranted because: 1) HIOSH [the Director] has failed to present sufficient admissible evidence "that Estrella was the foreman in charge of the work site on the day of the inspection;" and 2) the substance of the delegation of authority, not the formal title of the employee, is controlling.

On May 13, 2014, the Board heard oral argument on Respondent's Motion. At the hearing, the attorneys for both parties primarily reiterated and emphasized the arguments made in their pleadings. However, Deputy Attorney General (AG) Doris Dvonch (Dvonch) representing the Director further argued, over DDL attorney's objections, that there is a genuine issue of material fact regarding whether DDL had constructive knowledge because the foreman Estrella plainly saw his coworker or apprentice committing a fall protection violation but took no action to correct or prevent this condition. Following the oral argument, the Board took the matter under advisement and further provided that if the Motion is denied, a status conference will be scheduled.

C. Background

The exhibits[2] attached to the DDL Memorandum and the Director Memorandum establish the following findings of fact for purposes of the Motion for Summary Judgment.

DDL is a heating, ventilation, and air conditioning (HVAC) subcontractor on Maui. On April 16, 2013, DDL was working as a subcontractor for the general contractor F & H Construction at the Kihei Police Station work site at 2201 Piilani Hwy. Kihei, Hawaii. *See Sato Declaration, Ex. 1 at DDLC 15.*

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[2] DDL objected to the Declaration of Charles Clark (Clark Declaration) based on the fact that "belief and information" is not admissible evidence in accordance with Rule 56(e), which states, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,...."

Paragraphs 5 and 6 of the Clark Declaration state:

5. It is my belief and understanding that foreman Estrella was the person in charge with supervisory authority at the work site for Dorvin D. Leis Co., Inc. on April 16, 2013.
6. During my investigation, F & H Construction's work site superintendent, James Blackburn, believed that Estrella as [sic] the foreman for Dorvin D. Leis Co., Inc.

The HLRB agrees with DDL that Hawaii Rules of Civil Procedure (HRCP) Rule 56(e) requires that these two paragraphs be stricken because paragraph 5 is a conclusory allegation based on information and belief; and paragraph 6 is obviously hearsay, for which the Director has noted no exception. Sicor, Ltd. v. Cetus Corp., 51 F.3d 848, 861 (9th Cir. 1995); Taylor v. List, 880 F.2d 1040, 1045-1046 (9th Cir. 1989); Angel v. Seattle-First Nat'l. Bank, 653 F.2d 1293, 1299 (9th Cir. 1981).

On that date, Clark drove by the area of the new Kihei Police Station after being contacted by a Maui safety person who observed employees working on the flat part of a roof without fall protection at that jobsite. From the highway, Clark saw two employees on the flat top area of the taller building in the process of running duct work for an HVAC system through a roof penetration. The employees were wearing safety harnesses but were not tied off. The roof had a 4/12 pitch on the downward side and a 25 foot drop to the lower level of dirt and rocks. The distance between the roof area where the employees were working and the open sided edge was approximately 50 feet. *See Sato Declaration, Ex. 1 at DDLC 15-16, 25.*

Clark stopped his vehicle, further observed the employees, and took photos. He then met with the F & H Superintendent Blackburn regarding these employees working without fall protection. Blackburn identified the employees as DDL employees. Clark requested that Blackburn bring the two employees down, so that Clark could talk to the person in charge. Blackburn contacted and brought the DDL employees down for Clark to "interview and get the foreman to do the opening conference and explain why I was there and what I saw." *See Sato Declaration, Ex. 1 at DDLC 16, Ex. 2 at 0047; Declaration of Doris Dvonch (Dvonch Declaration), Ex. B at 44-50, 85-93.*

The two DDL employees, as indicated in the Inspection Report, were identified as the foreman Estrella and an apprentice sheetmetal worker "Kris Bibo."[3]

After Clark presented his credentials, Estrella identified himself as the foreman for DDL and participated in the opening conference, walk around, and closing conference as the "employer representative." *See Sato Declaration, Ex. 1 at DDLC 16-17.*

During the interview process, Estrella was identified as the foreman and stated that while there were anchorage points on the roof area and the company policy is to use fall protection, "we kept getting tangled." *See Sato Declaration, Ex. 1 at DDLC 32.*

During the Investigation, Clark did not inquire into when Estrella was told by DDL that he was the foreman or the nature of his job or foreman duties. Further, Clark did not obtain any facts indicating whether: 1) DDL told Estrella that he had the right to direct or manage other employees, be responsible for company assets, or control the work of other employees; or 2) Estrella had ever terminated, hired, disciplined, granted leave, or assigned work to any employees. In concluding that Estrella was the foreman, Clark relied on Estrella's statement that he was the foreman and "common knowledge" that a person given the foreman title usually supervises employees; is in charge of making sure the work is done correctly and on time; and has responsibility for making sure that employees are performing the work safely and in accordance with the company's safety policies and rules. *See Sato Declaration, Ex. 2 at 0066-0067.*

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[3] The Director noted in his Memorandum that personnel records obtained from Respondent contained the correct spelling of the employee's name as "Kris Bio", but the investigative file misspelled his name as "Kris Bibo."

II. CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Standards for Summary Judgment

Under the Hawaii Rules of Civil Procedure Rule 56 (Rule 56) (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Haw. 46, 55-56, 292 P.3d 1276, 1285-1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatives, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Haw. 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Haw. 125, 129, 267 P.3d 1230, 1234 (2011) (Thomas). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Haw. 462, 473, 99 P.3d 1046, 1057 (2004)(French).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court (Court) has adopted the burden shifting paradigm:

> The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.
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> First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.
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> Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law.

French, 105 Hawai'i at 470, 99 P.3d at 1054 (citation and emphasis omitted).

> Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial.

Ralston, 129 Haw. at 56-57, 292 P.3d at 1286-1287 (emphases added); French, 105 Haw. at 471-472, 99 P.3d at 1055-1056.

"Where the movant attempts to meet his or her burden through the latter means, he or she must show not only that the non-movant has not placed proof in the record, but also that the non-movant will be unable to offer proof at trial." Ralston, 129 Haw. at 60-61, 292 P.3d at 1290-1291 (citations omitted). Accordingly, in general, merely asserting that the non-moving party has not come forward with evidence to support its claim is not enough for a summary judgment movant to carry its burden. Id. at 61, 292 P.3d at 1291. "The movant must first demonstrate that the non-moving party cannot carry its burden of proof at trial. The distinction between not placing proof in the record and not being able to offer proof at trial is crucial." Id. at 59, 292 P.3d at 1289.

Finally, when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Foronda v. Hawaii International Boxing Club, 96 Haw. 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Haw. 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

B. DDL's Motion for Summary Judgment

"To establish a violation of an occupational safety 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." Dir. of Dept. of Labor and Indus. Relations v. Permasteelisa Cladding Technologies, Ltd., 125 Haw. 223, 227, 257 P.3d 236, 240 (Haw. Ct. App. 2011) (Permasteelisa), *judgment entered by*, 2011 Haw. App. LEXIS 753 (2011). In establishing knowledge on the part of the employer, it is well-settled federal OSHA precedent[4] that when a supervisory employee has actual knowledge of the violative condition, the supervisor's knowledge is imputed to the employer. A.P. O'Horo Company, Inc., 14 OSHC 2004 (No. 85-369 1991) (A.P. O'Horo); Dover Elevator Company, Inc., 16 OSHC 1281 (No. 91-862 1993). DDL asserts that summary judgment should be granted in its favor because HIOSH [the Director] cannot prove the fourth required element of "employer knowledge."

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[4] The Court has held that where the State structure is modeled after the federal Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 *et. seq.*, we look "to the interpretation of analogous federal laws by the federal courts for guidance." Permasteelisa, 125 Haw. at 228, 257 P.3d at 241, *citing*, French, 105 Haw. at 467, 99 P.3d at 1051.

Since the non-movant Director has the burden of proof at trial, the Board finds that the burden shifting paradigm set forth above is applicable to DDL's motion for summary judgment. Consequently, DDL has the initial burden of presenting evidence either: 1) negating the element of its knowledge of the violative condition; or 2) demonstrating that the Director will not be able to carry its burden on this issue at trial regarding this issue. Then, the burden shifts to the Director to respond and demonstrate specific facts presenting a genuine issue of material fact to go to trial.

To carry this initial burden, DDL argues that the Director is unable to show that Estrella is a "supervisor" for the purposes of imputing knowledge to DDL for two reasons. First, DDL maintains that HIOSH's investigation resulting in the Citation was not a "thorough and effective inspection," as required by FOM guidelines. Specifically, DDL maintains that Clark failed to inquire regarding: 1) whether and when Estrella was designated to be a foreman; and 2) whether Estrella met the definitions of "supervisor" under the NLRA §2(11) and/or acted as a representative of the "employer" under § 396-3, HRS, by facts establishing his authority to direct or manage other employees; being responsible for company assets; controlling the work activities of other employees; and terminating, hiring, disciplining, granting leave, or assigning work to any employees. Further, DDL asserts that Estrella could not be a "supervisor" under the NLRA §2(11) based on being a Union bargaining unit member.

Regardless of DDL's framing of these issues, the Board finds that DDL is attempting to carry its initial burden on summary judgment by demonstrating that the Director will be unable to carry its burden of proof at trial[5] of showing that Estrella is a "supervisor" whose knowledge is imputable to DDL. Consequently, DDL is first required to show that the Director has not placed proof in the record of Estrella's supervisory status at the time of the investigation. Then, DDL must further establish that the Director will be unable to offer such proof at trial. Ralston, 129 Haw. at 60-61, 292 P.3d at 1290-1291. The Board finds that DDL fails to carry this burden.

The Board finds no merit in DDL's assertion that Estrella's Union membership precludes him from being a "supervisor" for purposes of imputing knowledge to Respondent. It is well-settled federal OSHA precedent that a bargaining unit member may be a "supervisor" for purposes of imputing knowledge to the employer. See Tampa Shipyards, 15 OSHC 1533 (No. 86-360 1992) (Tampa Shipyards); Rawson Contractors, Inc., 20 OSHC 1078 (No. 99-0018 2002) (Rawson); Propollex Corp., 18 OSHC 1677 (No. 96-0265 1999) (Propollex).

While both parties appear to rely on the definition of "employer" contained in §386-3, HRS, for their respective positions regarding whether Estrella was a "supervisor" at the time of the investigation, there is obviously a genuine issue of material fact regarding the application of such definition to the facts of this case. Hence, for this reason and for the reasons set forth below regarding the applicable criteria, DDL is unable to carry its burden based on this argument.

Further, the Board determines that DDL's reliance on the FOM provision for its assertion that Clark had a responsibility to inquire into whether Estrella met the NLRA § 2(11) definition

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[5] DDL has not offered any affirmative evidence that Estrella had no supervisory authority or that DDL had no knowledge of the Fall Protection violation. Accordingly, DDL does not appear to present any evidence negating the element of its knowledge of the violative condition. Rather, DDL appears to be relying upon the Director's failure to point out evidence in the record of DDL's actual or direct knowledge.

of "supervisor" or acted as the "employer" representative under §396-3, HRS, lacks authority. The Board is not aware of, nor does DDL cite, to any authority or standard requiring such inquiry to be made for a "thorough and effective investigation" under this FOM provision.

DDL is correct that the substance of the delegation of authority, not the title of the employee is controlling of the determination of supervisory status. However, a review of the relevant OSHA authority shows that the proper inquiry for a determination of "supervisory" status for purposes of imputing knowledge to an employer is not limited to the NLRA §2(11) criteria for "supervisor" or the HRS §396-3 definition of "employer." Rather, "supervisory status…may be established by other indicia of authority that the company has empowered the employee to exercise on its behalf." Teddy Mosley Painting, 2013 OSHD P33316 (No. 12-2154) (emphasis added); Dover Elevator Co., 16 OSHC 1281 (No. 91-862 1993); Diamond Installations, Inc., 21 OSHC 1688 (No. 02-0280 & 02-2081 2006); M.C. Dean, Inc., 23 OSHC 1800 (No. 10-0549 2011).

In Rawson Contractors, Inc., 20 OSHC 1078, 1080 (No. 99-0018 2003) (Rawson), the Commission[6] emphasized that the relevant indicia of supervisory authority for purposes of imputing knowledge to the employer is broader than title, designation as a supervisor, and the authority to hire. The Commission determined that the appropriate focus is whether the foreman is the employer's designated "competent person on site:"

> On the issue of knowledge, Rawson in essence argues that the foreman, an hourly-paid union employee with no vacation and holiday benefits, is too remote from management to have his knowledge imputed to Rawson. In support of its argument, Rawson points out that the foreman has neither the title of supervisor nor the authority to hire or fire employees. However, this argument is inherently flawed and, equally significant, ignores a critical responsibility bestowed by the employer upon the foreman.
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> Taking the latter point first, we find decisive significance in the fact that the foreman was Rawson's designated competent person on site -- a designation for which to qualify he received substantial additional training and which among other things meant that he was responsible for compliance with OSHA regulations. As the on-site competent person assigned and authorized by the company, it was the foreman's duty to identify and take prompt corrective measures to eliminate hazards.
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> In addition, our precedents establish that job titles are not controlling and that the power to hire and fire is not the *sine qua non* of supervisory status, which can be established on the basis of other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf. Here, the judge found that the foreman was assigned by Rawson to supervise the work activities of his crew, to take all necessary steps to complete job assignments, and to ensure that the work was done in a safe manner. Thus, the fact that the foreman was not formally designated a supervisor and that he did not have the authority to hire and fire employees does not diminish either his status as the on-site competent person or the other indicia of supervisory authority that he clearly possessed.

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[6] "Commission" refers to the "Occupational Safety and Health Commission," as established by 29 U.S.C. §661, to resolve contests regarding citations and penalties issued following an inspection or investigation.

Accordingly, we find the foreman's knowledge is properly imputed to Rawson.

(emphases added, footnotes and citations omitted) See also: CMH Material Handling, LLC, 18 OSHC 1520 (No. 96-0997 1998) (CMH); Propollex, 19 OSCH 1677.

Contrary to DDL's assertion, under federal OSHA cases applying the indicia of authority criteria, foremen have been recognized as supervisors and employees with indicia of supervisory authority whose knowledge may be imputed to the employer. Tampa Shipyards, 15 OSHC 1533 (No. 86-360; 86-409 1992); L.R. Willson and Sons, Inc., 1995 OSAHRC LEXIS 165 (No. 94-1546); CMH, 18 OSHC 1520 (No. 96-099 1998); A.P. O'Horo, 14 OSHC 2004 (No. 85-369 1991); A & W Construction Services, Inc., 19 OSHC 1659 (No. 00-1413 2001); Iowa Southern Utilities Co., 5 OSHC 1138 (No. 9295 1977).

DDL has not argued that there is absolutely no evidence to support Estrella's supervisory status. DDL asserts instead that HIOSH has failed to present sufficient admissible evidence "that Estrella was the foreman in charge of the work site on the day of the inspection." The Board finds this assertion inadequate to discharge its burden on summary judgment. "Merely asserting that the non-moving party has not come forward with evidence to support its claims is not enough…the movant must first demonstrate that the non-moving party cannot carry its burden of proof at trial. 'The distinction between not placing proof in the record and not being able to offer proof at trial is crucial.'"[7] French, 105 Haw. at 472, 99 P.3d at 1056.

Nor is the movant DDL able to demonstrate that the Director, as the non-moving party, cannot carry his burden of proof at trial. DDL's argument that the Director cannot point to any evidence that DDL had actual or direct knowledge that Estrella and Bio violated the Fall Protection standard is nothing more than a mere assertion. DDL is essentially contending that the Director has not come forward with evidence to support his claim. Again, the Board finds that this contention is not enough to establish that the Director is unable to carry his burden of proof at trial. Particularly lacking is that DDL has not argued nor pointed to any specific portions of the record proving that the Director ultimately will not be able to offer proof at trial regarding Estrella's supervisory status for the purpose of imputing knowledge to DDL of the violative condition.[8] Hence, the Board concludes that DDL has not made the requisite showing.

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[7] In French, the Court cited the opinion of Justice White in Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986), stating:

> [a] plaintiff need not initiate any discovery or reveal his witness or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.

[8] In Ralston, the Court, in upholding the ICA's decision vacating the circuit court's grant of summary judgment in favor of the defendant dentist in that case, found that the movant did not satisfy his burden of production for summary judgment. In so finding, the Court concluded that the movant dentist failed to demonstrate that the non-movant patient could not meet his burden of proof at trial by either providing affirmative evidence of his position that he did not breach the standard of care, or pointing to anything to indicate that the patient would not be able to offer proof at trial of a breach of the standard of care. In its opinion, the Court distinguished cases in which the movant made the requisite showing. These cases involved situations, in which the non-moving party would be unable to offer the requisite proof at trial because the expert evidence at issue was inadmissible, such as

Like the movant in the Ralston case, DDL has not provided affirmative evidence to support its position that it lacked knowledge of the violative condition resulting in the Citation in this case. Nor has DDL pointed to anything indicating that the Director would not be able to offer proof at trial of Estrella's supervisory status for the purposes of imputing knowledge. Based on the foregoing, the Board concludes that the moving party DDL has not carried its initial burden of proving that no genuine issue of material fact exists regarding DDL's knowledge of the violative condition based on the imputed knowledge of its foreman Estrella entitling DDL to summary judgment as a matter of law.

Even if DDL is able to carry its burden for summary judgment, the burden then shifts to the Director to respond and demonstrate specific facts presenting a genuine issue worthy of trial regarding Estrella's supervisory status for purposes of imputing knowledge to DDL. Based on the record herein and applying the appropriate standard, the Board finds that the Director would be able to carry his burden. The undisputed evidence in the record viewed in the light most favorable to the Director, as the non-moving party, creates a genuine issue of material fact regarding the indicia of authority required to show that Estrella was a supervisor at the time of the Inspection. Among other facts, the Board notes that when Clark requested that Blackburn call down the person in charge, Blackburn brought Estrella down. Further, Estrella identified himself as the foreman and participated in the open and closing conferences and walk-around as the "employer representative. In short, Estrella held himself out as the foreman and person in charge. Field & Associates, Inc., 2001 OSHC P32, 295 (No. 99-1951 2001). Also compelling is the fact that there were only two DDL employees working on the Kihei Police Station jobsite on the day of the investigation, and the foreman Estrella was obviously senior to the apprentice Bio. DDL asserts that Estrella was not the supervisor and points to a lack of evidence that Estrella supervised Bio. Nevertheless, DDL does not dispute that Estrella was a foreman and further fails to designate any other employee as the supervisor at the time of the investigation. The Board takes no position regarding the ultimate determination regarding whether this evidence in the record is sufficient to show the requisite indicia of authority to find that Estrella was a "supervisor" for purposes of imputing knowledge of the violation to DDL.[9] To reiterate, however, the Board concludes that DDL has not carried its burden of proof for summary judgment on this issue. Further, we determine that even if DDL had been able to do so, the Director could also have carried his burden to present a genuine issue of material fact on this issue based on the evidence in the record.

The Board notes that at the hearing, the Deputy AG raised the issue of constructive knowledge through plain view. DDL's attorney objected on the ground that the issue was not

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due to discovery deadlines being passed, or the evidence having been reviewed by the Court and found insufficient. 129 Haw. at 59-61, 292 P.3d at 1289-1291. For example, in Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co., 116 Haw. 277, 172 P.3d 1021 (2007), the deadline for submission of final expert reports had passed, and the reports of plaintiffs' experts that were submitted were insufficient to prove damages. Further, in Thomas, 126 Haw. at 132, 267 P.3d at 1238, the Court ruled that the plaintiff could not satisfy her burden of proof at trial after reviewing her expert's declaration and citation to several cases. In this case, there is no similar showing of expert evidence regarding Estrella's supervisory status that is inadmissible or insufficient based on these grounds.

[9] Based on the foregoing inquiry, the issue of an employee's supervisory status must be decided on an individualized basis. In French, 105 Haw. at 465, 99 P.3d at 1049, the Court noted that determination of an issue based on an individualized inquiry is inappropriate for summary judgment.

addressed in the Director's Memorandum. DDL stated in its Memorandum that, "To avoid summary judgment, HIOSH must show that DDL 'should have known' under the 'reasonable diligence test." Further, the Director referenced plain view in his Memorandum. Based on the record, however, the Board determines that DDL failed to carry its burden on this issue as well by failing to demonstrate that the Director has not placed proof in the record of constructive knowledge, and that the Director will be unable to offer such proof at trial. Accordingly, the Board finds a genuine issue of material fact regarding the issue of whether DDL had constructive knowledge of the Fall Protection violation, which should be resolved at trial.

ORDER

For the reasons discussed above, the Board hereby denies DDL's Motion for Summary Judgment, filed on March 18, 2014.

NOTICE OF STATUS CONFERENCE

As discussed above, the Hawaii Labor Relations Board (Board) denies the Respondent's Motion for Summary Judgment (Motion). At the hearing on the Motion, held on May 13, 2014, the Board stated that if the Motion was denied that a status conference would be scheduled. This status conference is for the purposes of establishing a hearing date on the merits of the instant appeal.

NOTICE IS HEREBY GIVEN THAT THE Board will conduct a status conference in the above-entitled case on **Tuesday, July 15, 2014 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii, June 24, 2014

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

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