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**Case No. OSH 2014-9**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR  
AND INDUSTRIAL RELATIONS,

Complainant,

and

COLOR DYNAMICS, INC.,

Respondent.

CASE NO. OSH 2014-9

ORDER NO. 711

ORDER DENYING RESPONDENT  
COLOR DYNAMIC, INC.'S MOTION FOR  
SUMMARY JUDGMENT; NOTICE OF  
SECOND INITIAL/SETTLEMENT  
CONFERENCE

ORDER DENYING RESPONDENT COLOR  
DYNAMIC, INC.'S MOTION FOR SUMMARY JUDGMENT

I. FINDINGS OF FACT

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. Procedural Background

On March 10, 2014, the Board received from the Director of the Department of Labor and Industrial Relations (Director or Complainant) a Notice of Contest regarding a Citation and Notification of Penalty (Citation) issued to Respondent COLOR DYNAMICS, INC. (Respondent), January 29, 2014, and resulting from Inspection Number 316271956 which was conducted during the period from September 11, 2013 to October 18, 2013 (Inspection), by the Director's Occupational Safety and Health Division (HIOSH). The Director cited "serious" violations of Hawaii Administrative Rules (HAR) § 12-110-2(b)(1)(B)(viii) [Citation 1, Item 1], HAR § 12-110-2(b)(1)(B)(x) [Citation 1, Item 2], 29 CRF § 1926.501(b)(1)/HAR § 12-110-50(a) [Citation 1, Item 3], 29 CRF § 1926.502(d)(8)/HAR § 12-110-50(a) [Citation 1, Item 4], 29 CRF

**I do hereby certify that this is a full, true and  
correct copy of the original on file in this office.**

  
Hawaii Labor Relations Board

§ 1926.502(d)(11)/HAR § 12-110-50(a) [Citation 1, Item 5], 29 CFR § 1926.502(d)(21)/HAR § 12-110-50(a) [Citation 1, Item 6], 29 CFR § 1926.503(a)(2)/HAR § 12-110-50(a) [Citation 1, Item 7], 29 CFR § 1926.503(b)(1)/HAR § 12-110-50(a) [Citation 1, Item 8] and 29 CFR § 1926.404(f)(6)/HAR § 12-110-50(a) [Citation 1, Item 9]. Also, the Director cited “other” violation of 29 CFR § 1926.51(a)(1)/HAR § 12-110-50(a) [Citation 2, Item 1]. The Director assessed a combined penalty of \$63,250. Respondent contested the Citation by letter to HIOSH on February 13, 2014.

On October 7, 2014, Respondent filed Respondent Color Dynamic, Inc.’s Motion for Summary Judgment, together with Memorandum in Support of Motion and Exhibit “1” (collectively Motion for Summary Judgment).

By Order No. 616 dated October 21, 2014, Order Granting Complainant Director of Labor and Industrial Relations’ Motion to Continue Discovery and Move Trial, the Board scheduled a status conference on December 8, 2014 to establish new discovery deadlines and trial dates.

On November 14, 2014, the Director filed Complainant Director of Labor and Industrial Relations Memorandum in Opposition to Respondent Color Dynamics, Inc.’s Motion for Summary Judgment filed October 27, 2014, together with the Declaration of Irvin Yoshino, Exhibit “1,” Declaration of J. Gerard Lam, and Exhibits “2” – “5” (collectively Opposition Memo).

By Order No. 627 dated November 20, 2013, Order Granting Respondent’s Request to Extend Reply Memorandum Deadline and Continued Status Conference; and Notice of Continued Status Conference, the Board extended the deadline for Respondent’s reply memorandum from November 24, 2014 to December 8, 2014, and rescheduled the status conference from December 8, 2014 to December 14, 2014.

On December 8, 2014, Respondent filed Respondent Color Dynamics, Inc.’s Reply Memorandum in Support of Its Partial Motion for Summary Judgment filed on October 7, 2014, together with the Declaration of Christine K. David and Exhibits “M” – “N” (collectively Reply Memo).

Oral arguments were heard by the Board on the Motion for Summary Judgment on January 5, 2015.

B. Factual Background

The focus of the Partial Motion for Summary Judgment is on that certain event on September 11, 2013, which occurred at the Embassy House, a high-rise residential condominium building at 802 Prospect Street in Honolulu. The Penthouse occupied the western half of the seventh floor of the Embassy House and included a walkway bordered by a concrete wall

protecting the south, west and north sides of the walkway. The walkway area is called the Lanai.

The eastern half of the seventh floor was the Courtyard, which had exposed and unprotected edges on its north, east and south sides. The perimeter of the Courtyard previously had parapet walls, which were removed for replacement about three months before the September 11, 2013 accident. Without the parapet walls, the Courtyard perimeters had no protection against falls.

The Courtyard could only be accessed in three different ways: (1) from a stairwell at the building east end (East Stairs), (2) from the northern-end of the Lanai through a glass door leading to the Courtyard (North Lanai Door), and (3) from the southern-end of the Lanai through a glass door leading to the Courtyard (South Lanai Door). According to the Director, anyone walking from the Lanai through South Lanai Door would be exposed immediately to the Courtyard's south unprotected edge which was seven floors high.<sup>1</sup>

On September 11, 2013, Louis Martin (Martin), an employee of Respondent, was killed in a seven-story fall. Martin was on the south Lanai and he fell after walking onto the Courtyard through the South Lanai Door. It is not disputed that Martin was not wearing a safety harness and was not connected to any fall protection system when he fell to his death.

#### LEGAL STANDARDS FOR MOTION FOR SUMMARY JUDGMENT

The Board adheres to the legal standards set forth by the appellate courts for motions for summary judgment under Hawaii Rules of Civil Procedure (HRCP) Rule 56(b).

Under HRCP Rule 56(b), a party "may move with or without supporting affidavits for a summary judgment in the party's favor[.]" Ralston v. Yim, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, 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 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). 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 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

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<sup>1</sup> See, Opposition Memo, Yoshino's Declaration, paragraph 19 on pages 3 and 4.

In addition, for cases in which the non-movant bears the burden of proof at trial, which is the case here, the Hawaii Supreme Court has adopted the burden shifting paradigm: 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; once the moving party satisfies its initial burden of production, the burden shifts 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. 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 Hawaii at 470, 99 P.3d at 1054.

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 Hawaii at 56-57, 292 P.3d at 1286 - 1287; French, 105 Hawaii at 472, 99 P. 3d at 1056. However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCF Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] 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 [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawaii 51 , 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

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 or her pleading, but his or her 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 the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him or her. 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).

## II. DISCUSSION, CONCLUSIONS OF LAW 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. Motion for Summary Judgment

Respondent seeks partial summary judgment only with respect to Citation 1, Item 3 which is based on the Director's claim that Respondent violated 29 CRF § 1926.501(b)(1)/HAR § 12-110-50(a) when it failed to train and direct its employees to use fall protection as needed. In the Motion for Summary Judgment, Respondents contend that "[s]ummary judgment is proper

because Complainant cannot establish that Respondent failed to train and direct its employees to use fall protection as needed.”<sup>2</sup>

The Director argues in its Opposition Memo that the Motion for Summary Judgment should be denied because: (1) Respondent has not shown that all of its employees were provided with a complete personal fall arrest system; (2) Respondent has not shown that of its employees were provided with training and direction in the use of personal fall arrest systems; and (3) Respondent gave its employees incorrect training and direction in the use of personal fall arrest systems.

In the Reply Memo, Respondent clarifies its argument and explains that it seeks partial summary judgment on Citation 1 Item 3 only with respect to Martin, and not violations with respect to other employees. Focusing on Martin, Respondent cites Dir., Dep 't of Labor & Indus. Relations v. Permasteelisa Cladding Technologies, Ltd., 125 Hawai'i 223, 230,257 P.3d 236, 243 (App. 2011), and contends that the Director must establish that Respondent (1) failed to provide Martin with fall protection, and (2) failed to provide Martin with training and direction in the use of fall protection. Without the establishment of these facts, Respondent argues that the Director cannot prove a violation of 29 CFR § 1926.501 (b)(1), the cited standard for Citation 1 Item 3. Respondent claims that “Martin fell to his death from the Courtyard without wearing his company-issued safety harness despite having being trained and directed to do so and there being an available anchor point.”<sup>3</sup> The Board rejects Respondent’s attempt to clarify its argument because the Motion for Summary Judgment was obviously not limited to Martin but argued that “Complainant cannot establish that Respondent failed to train and direct its employees to use fall protection as needed.”

Further, the Board hold that finds that there are genuine disputes of material fact regarding the September 11, 2013 fall and death of Martin, including the actions and conduct of Respondent regarding the fall protection training and program implementation by Respondent, including but not limited to the following:

1. The Director claims that Respondent has failed to establish that Martin was provided with the requisite fall protection equipment at the time of his fall. More specifically, the Director points out that Respondent merely claims that Martin was equipped with a harness at the time of his fall but presents the evidence shows that both Martin and Kitagawa were not wearing fall protection at the time of the accident and there was no evidence that these employees, including Martin, also had the appropriate lifelines or anchor points. In fact, the Director further points to HIOSH Safety Compliance Officer Irvin Yoshino’s Declaration that during the investigation, Respondent’s staff provided

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<sup>2</sup> See, Motion for Summary Judgment at page 2.

<sup>3</sup> See Reply Memo at page 3.

statements that Respondent had no anchor points or lifelines in the Courtyard for its employees to use as part of a personal fall arrest system.<sup>4</sup> Doug Goodwin, Respondent's foreman, similarly confirmed in his statement that Respondent had no anchor points on the Penthouse roof.<sup>5</sup> Additionally, Brent Cullinan, Respondent's President, provided a statement that Respondent did not use safety net or monitoring systems.<sup>6</sup> These statements were confirmed by Respondent in answers to interrogatories that it "did not have any work or safety lines or any other equipment in the Courtyard at the time of the Accident."<sup>7</sup> Based on this evidence, there obviously are genuine questions of material fact regarding whether Respondent had made the proper fall protection equipment available to the employees, including Martin at the time of his fall on September 11, 2013.

2. There are also genuine issues of material fact regarding whether Respondent gave its employees, including Martin, correct training and direction in the use of fall protection. Cullinan's statements obtained during the HIOSH investigation and attached to the Yoshino Declaration indicate that Respondent's work practice at the Heritage House jobsite did not require its employees to tie off when *walking* on the Courtyard or *working* on the Penthouse roof. Cullinan said that Respondent required its employees to use fall protection when *working* on the Courtyard, but not when *walking* on it. Cullinan said that fall protection was only required when Respondent's workers were working, *not walking*, on the edges.<sup>8</sup> This distinction between *walking* versus *working* on the edges of the roof was at the direction of Respondent and was followed by its workers, including Martin. The Director challenges Respondent's claim that its training and direction of its workers on fall protection was in compliance with the requirements of 29 CFR § 1926.501 (b)(1). The Board finds that there is a genuine dispute of material fact on this issue at this preliminary stage of this case.
3. Although Respondent claims that there was no "work-related" reason for Martin to have accessed the Courtyard through the South Lanai Door, there is no evidence that Respondent barred Martin and other employees from entering the Courtyard. Also absent is any evidence that Respondent took action to block or limit Martin's access to the Courtyard through the South Lanai Door. The Director properly argues that there

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<sup>4</sup> See Opposition Memo, Yoshino Declaration, paragraph 36 on page 6.

<sup>5</sup> See Opposition Memo, Yoshino Declaration, paragraph 30 on page 4.

<sup>6</sup> See Opposition Memo, Yoshino Declaration, paragraph 38 on page 6.

<sup>7</sup> See Opposition Memo, Lam Declaration, Exhibit 5 at page 11.

<sup>8</sup> See, Opposition Memo, Yoshino Declaration, paragraphs 39 through 41, at page 6.

is a genuine issue of material fact regarding whether Respondent violated 29 CFR § 1926.501 (b)(1) when it took no action to “block” Martin’s to access the Courtyard through the South Lanai Door which was unlocked.

In short, based on the foregoing, Respondent, as the movant in this case, has failed to meet its burden on summary judgment to 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 its proof at trial. On the other hand, the Complainant has submitted the requisite response by the Yoshino Declaration and the answers to interrogatories and other supporting documents establishing that there are genuine issues for trial.

Lastly, Respondent attempt to shield itself from fault by deflecting blame from itself to Martin is appropriate only if Respondent can carry its burden to establish the affirmative defense of "employee misconduct." The Board has previously held that this affirmative defense is sustained when the employer establishes that (1) the employer has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to detect and correct violations, especially if there were incidents of prior non-compliance; and (4) it has effectively enforced the rules when violations have been discovered. *See, Dir., Dep't of Labor & Indus. Relations v. Kiewit Pacific Co., OSAB 94-009 (3/1/96) (Kiewit)* "[T]he basic premise of this defense is that it would be unfair and would not promote employee safety and health to penalize an employer for conditions that were unpreventable and not likely to recur." *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Board*, 167 Cal. App. 3d 1232 (Cal. Ct. App. 1st Dist. 1985) (*citing* Rothstein, *Occupational Safety and Health Law*, (2d ed. 1983) *Compliance with Standards*, § 117, p. 143).

In the Motion for Summary Judgment, Respondent failed to address the four-part test in *Kiewit*. The Board finds that based on the evidence presented by Respondent and the Director, Respondent has not met its burden of proof to establish the “employee misconduct” defense in summary fashion. As such, Respondent’s Motion for Summary Judgment must be denied.

B. Order.

Based on the foregoing, the Board hereby denies/grants the Motion for Summary Judgment and gives notice to the parties of a second initial/settlement conference to set the case for a hearing on the merits.

**NOTICE OF SECOND INITIAL/SETTLEMENT CONFERENCE**

NOTICE IS HEREBY GIVEN that the Board will conduct a second initial/settlement conference in this matter on **November 10, 2015**, at **9:00 a.m.**, in the Board's hearing room located at 830 Punchbowl Street, Room 343, Honolulu, Hawaii, 96813. All parties have the right to appear in person and to be represented by counsel or a representative.

Any party not residing on the island of Oahu may appear telephonically at the second initial/settlement conference by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY islands of Hawaii, Kauai, or Maui) to make the necessary arrangements no later than ten days prior to the second initial/settlement conference.

Auxiliary aids and services are available upon request by calling Ms. Ebata at the above-listed telephone numbers. A request for reasonable accommodations shall be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, October 28, 2015.

HAWAII LABOR RELATIONS BOARD



*Kerry M. Komatsubara*

KERRY M. KOMATSUBARA, Chair

*Sesnita A.D. Moepono*

SESNITA A.D. MOEPONO, Member

*Rock B. Ley*

ROCK B. LEY, Member

Copies to:

J. Gerard Lam, Deputy Attorney General, Attorney for the Director

Jeffrey S. Harris, Attorney for Respondent

**NOTICE TO EMPLOYER**

You are required to post a copy of this notice at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the conference date. Further, you are required to furnish a copy of this notice to a duly recognized representative of the employees at least five working days prior to the conference date.