STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and INTERNATIONAL ROOFING & BUILDING CONSTRUCTION, INC., Respondent.	CASE NO. OSH 2009-10 ORDER NO. 713 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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

Following a *de novo* proceeding before the Hawaii Labor Relations Board (Board), and for the reasons discussed below, the Board finds in favor of Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR) and affirms the Citation and Notification of Penalty (Citation) issued by the Director on February 20, 2009.

The Board members thoroughly reviewed all the evidence and arguments presented, and issue these proposed findings of fact, conclusions of law, and decision and order pursuant to Hawaii Revised Statutes (HRS) § 91-11, which provides in relevant part:

> Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affect to file exceptions and present argument to the officials who are to render the decision[.]

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. To the extent the parties' post-hearing memoranda contain what may be construed as proposed findings of fact, any such facts submitted by a party that are not incorporated as a Board finding herein or that are clearly contrary to the findings herein, are denied.

I. PROCEDURAL HISTORY

On May 4, 2009, the Board received from the Director a Notice of Contest regarding the Citation that was issued to Respondent INTERNATIONAL ROOFING & BUILDING CONSTRUCTION, INC. (Respondent), on February 20, 2009, resulting from Inspection Number 311434054 (Inspection), by the Director's Occupational Safety and Health Division (HIOSH) which commenced on August 20, 2008). The Director cited a "willful" violation of 29 CFR 1926.501(b)(13) and assessed a penalty of $42,000.00. Respondent contested the Citation by letter which was received by HIOSH on March 13, 2009.

A pre-trial conference/settlement conference was held on May 27, 2009, and an August 25, 2000 trial date was agreed to by the parties. The trial date was later rescheduled to September 15, 2009, pursuant the request of the Director and set forth in the Amended Pretrial Order dated June 23, 2009 and identified as Order No. 327.

On September 15, 2009, an evidentiary hearing was held where oral testimony and documentary evidence were received by the Board.[1] Following the evidentiary hearing, the Director and Respondent submitted post-hearing memoranda supporting their positions on November 17, 2009, and December 10, 2009,[2] respectively.

II. FINDINGS OF FACT

A. The Inspection.

Respondent is a construction roofing contractor that was performing roof construction work on a house on Lot 15, Pauoa Way, Kamuela, Hawaii (Kamuela House) in August of 2008. On August 20, 2008, at approximately 9:00 a.m., occupational safety and health compliance officer Charles Clark (Clark) came upon Respondent's jobsite while driving in the Pauoa Beach resort community to conduct a scheduled general inspection of another employer. While passing the

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[1] While Board Chair Komatsubara and Board Members Moepono and Ley did not participate in the hearing in this matter, they have reviewed the entire record, including the pleadings, transcripts, and exhibits filed in this case.

[2] Respondent's Post-Hearing Memorandum dated September 18, 2009, and filed with the Board on December 10, 2009, did not have a certificate of service attached thereto.

jobsite he saw a worker performing work at the edge of the roof of the Kamuela House without any visible means of fall protection.[3] Clark parked his truck near the Kamuela House and took photographs of Respondent's worker who was standing on the first floor roof using a portable electric saw to trim the ends off the ceramic tiles that had been installed along the eaves of the roof. There was no guardrail or safety net system installed along the edge of the roof where the worker was working. The worker was wearing a harness but it was not connected or tied-off to any lanyard or lifeline. Clark took photos of this worker, which photos were entered into evidence as Exhibit 1, page 4, at the evidentiary hearing.

Clark entered the premises of the Kamuela House and spoke with Gaudencio Barrientos, the person-in-charge of the worksite for Respondent, who was standing on the Kamuela House roof. Mr. Barrientos was also the person Clark had observed not using fall protection. Clark asked him who he was working for and Barrientos immediately grabbed what appeared to be a lifeline or rope that was bundled in a nearby corner of the roof. This lifeline or rope was not attached to any anchorage point. Clark then walked to the front of the project to look for the person-in-charge, or the general contractor.

At this time, Clark observed another fall protection situation at an adjacent site which demanded his immediate attention and therefore, he left the Kamuela House for about 2 hours. Clark returned to the Kamuela House soon thereafter and met with Jim Young, the superintendent of Maryl Pacific Constructors, Inc. (Maryl), the general contractor of the Kamuela House project. Young informed Clark that Respondent was the roof subcontractor, and that Barrientos had already left the Kamuela House site.

Clark measured the ground-to-eave distance of the Kamuela House, where he had observed Barrientos, which was about 11 feet above the dirt and lava rock was on the ground below the eaves. Young told Clark that the pitch of the roof where Barrientos was working was 4/12 (4 inch rise for every 12 inch horizontal span). Clark did not observe any anchorage points for the attachment of a lifeline. Clark was of the opinion that if a worker fell from that spot, the worker would likely suffer a bone fracture.

B. Clark's Follow Up Investigation.

Clark went back to his office to call Samuel Villena, Respondent's Big Island manager. Initially, Villena did not admit that the person Clark saw on the roof at the Kamuela House on August 20, 2008 was an employee of Respondent; however, Villena, who was on Oahu on the incident date, eventually admitted that the worker was a Respondent employee.

Then, on August 25, 2008, Clark received a facsimile letter from Ariel Robiniol, Respondent's vice-president and safety supervisor, wherein Robiniol stated he had discussed the allegations and showed the photograph (Exhibit 1, page 4) to Barrientos, who asserted he was tied-

[3] According to HIOSH, conventional fall protection consists of a guardrail system, safety net system or personal fall arrest system. Citing, 29 CFR 1926.501 [chapter 121.2, HAR].

off to a lifeline.[4] On August 27, 2008, in response, to this August 25 letter, Clark e-mailed Respondent another photograph taken on August 20, 2008 (Exhibit 1, p. 6) which clearly showed that Barrientos was not tied-off. On August 27, 2008 also, Clark received in response a facsimile from Robiniol conceding that Barrientos was not tied-off, and therefore, Respondent had decided to terminate Barrientos from his job (Exhibit 1, pp. 115-116).

In a separate letter of the same date, Robiniol stated that "most of the time I personally do the periodic inspections. A foreman is designated to conduct the safety inspections if I'm not available to do them." Respondent's internal-company documents show that Robiniol was the foreman/supervisor at the Kamuela House on August 20, 2008, but Robiniol lives on Oahu and was not on the Big Island that day. Clark testified, without any contradiction by Respondent, that there was no other worker at the Kamuela House on August 20, 2008, which indicates that there was no person to oversee safety compliance by Barrientos.

Clark also received a copy of weekly job safety inspection reports for the week ending April 25, 2008, from Maryl project engineer Caroline Wadley. It revealed that on one day in the week of April 25, 2008, Maryl refused to permit Respondent's workers onto the roof of the Kamuela House project until safety harnesses were provided for all of them. A declaration of Mike Biddle, Maryl's superintendent for the Kamuela House project, indicates that he called Sam Villena (aka June) at Respondent's Honolulu office, and Villena told Biddle that more safety harnesses would be sent to the Kamuela House. Clark did not receive any documentation from Respondent of any disciplinary action by Respondent against any of the workers involved in this incident which arose in the week of April 25. Clark testified that the significance of this incident is that although Respondent had a fall protection policy in place, the company's lack of enforcement led the workers to believe that there were no adverse consequences resulting from work safety rule violations.

C. Respondent's Failure to Enforce Company Fall Protection Policies.

Respondent has an established work safety rule requiring 100% tie-offs for fall protection. In addition to failing to enforce its fall protection policy on August 20, 2008, the following evidence indicates that Respondent has a long, prior history of not enforcing company work safety rules:

1. In connection with the Inspection, HIOSH received other documents from Respondent, including two prior employee warning notices against Barrientos dated June 30, 2005 and December 5, 2005. These two notices against Barrientos were issued only after HIOSH inspections discovered and reported to Respondent the observed safety violations, and not from any in-house safety inspection conducted by Respondent.

[4] The letter also acknowledged Barrientos' failure as a jobsite safety coordinator, and that as a result, on November 21, 2007, Respondent appointed two other individuals, Noel Quijano and Juanito Badua, to be its Hawaii Island jobsite safety coordinators. It was noted by HIOSH that the removal of Barrientos as Respondent's jobsite safety coordinator occurred fifteen months prior to the Inspection.

2. Clark did not receive any documentation of periodic site inspections conducted by Respondent on the Big Island prior to the August 20, 2008 incident involving Barrientos.

3. Respondent has been cited for many previous similar violations, including the incident involving the violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] issued on August 1, 2007; the incident involving the violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] issued on February 20, 2007; the incident involving the violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] issued on January 9, 2006; the incident involving the violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] issued on August 2, 2005; the incident involving the violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR] issued on July 24, 2003; and the incident involving the violation of 29 CFR 1926.501(b)(10) [chapter 12-121.2, HAR] issued on May 7, 2002.

Respondent continued to fail to enforce the company's fall protection rules even after the August 20, 2008 incident as evidenced by Respondent's failure to take disciplinary action against any of the workers that failed to use the safety harnesses in the week of April 25, 2008, as reported by Mike Biddle of Maryl.

D. Penalties under the Citation.

On August 1, 2007, HIOSH issued a Citation and Notification of Penalty to Respondent. Citation 1, item 1 alleged a willful violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR]. Exhibit 1, p. 47. A $42,000.00 penalty was proposed.

The $42,000 penalty was calculated according to HIOSH's standard policies and procedures to avoid an arbitrary determination by the individual inspector. The penalty was determined by considering the severity of an injury if an accident occurred, the probability of an accident, and certain mitigating circumstances. The possible injury, a fracture, was given a severity of "high" and it was determined that the probability of such an injury was "greater" because Barrientos was working at the edge of the roof, bending over, and carrying a heavy electric saw. The combination of a "high" severity and a "greater" probability of injury resulted in a raw gravity-based penalty of $70,000.00.

The gravity-based penalty was adjusted in consideration of the size of Respondent's company. Respondent employed 35 workers at the time, and therefore received a 40% reduction of the gravity-based penalty.

E. Respondent's Challenge of the Citation.

After the presentation of evidence and testimonies of witnesses given at the evidentiary hearing, Respondent does not challenge (i) the factual findings of HIOSH in the Inspection, (ii)

the interpretation and application of the laws cited by HIOSH in the Inspection, or (iii) the amount of the penalty assessed in the Citation against Respondent. In its post-hearing statement, titled "Response to Letter dated September 16, 2009", Respondent claims, as the sole basis for Respondent's objection to the Citation and the penalty, "economic hardship." Respondent argues that "[e]ven if we choose the penalty fee, we don't have the money to pay it off,"[5] and cites difficulty in paying their suppliers and workforce and difficulty in paying off a previous HIOSH citation. Although Respondent maintains that "safety is very important", it does not dispute the findings of the Inspection, nor does Respondent raise any opposition to the Citation other than Respondent's inability to pay the penalty.

III. CONCLUSIONS OF LAW

The Board has jurisdiction over this case pursuant to HRS §§ 396-3 and 396-11.

Respondent is an employer within the meaning of HRS § 396-3, which provides in relevant part:

> "Employer" means:
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> * * *
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> (5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

The issues to be determined at trial were:

> A. Whether HHC violated OSHA Standard 29 C.F.R. § 1926.501(b)(13) as set forth in the Citation;
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> B. Whether the characterization of the subject notice of violation as "willful" is correct; and
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> C. Whether the penalty of $42,000.00 assessed by the Director is correct.

A. Respondent Violated OSHA Standard

[5] See, page 1 of Respondent's Post-Hearing Memorandum.

29 C.F.R. § 1926.501(b)(13) as Set Forth in the Citation.

To establish a violation of a standard, the Director must prove by a preponderance of the evidence that:

(1) the cited standard applies;
(2) there was a failure to comply with the cited standard;
(3) an employee had access to the violative condition; and
(4) the employer knew or should have known of the condition with the exercise of due diligence.

Director, DLIR v. Permasteelisa Cladding Techs., Ltd., 125 Hawaii 223, 227, 257 P.3d 236, 240 (App. 2011) (*quoting* Director v. Maryl Pacific Constructors, Inc., Case No. OSAB 2001-18, 2002 WL 31757252, at *6).

Pursuant to HRS § 91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion; the degree or quantum of proof shall be a preponderance of the evidence. The "preponderance of the evidence" standard directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence; the party with the burden need only offer evidence sufficient to tip the scale slightly in the party's favor, while the party without the burden can succeed merely keeping the scale evenly balanced (*see*, Kekona v. Abastillas, 113 Hawaii 174, 180, 150 P.3d 823, 829 (2006) (citation omitted)).

1. The cited standard applies.

29 CFR § 1926.501(b)(13) provides in relevant part:

> Residential construction. Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

29 CFR § 1926.501(b)(13) is incorporated in Title 12, Subtitle 8, Part 3, Chapter 121.2 of the Hawaii Administrative Rules (HAR), Department of Labor and Industrial Relations, Division of Occupational Safety and Health, Construction Standards, Fall Protection, by HAR § 12-121.2-1.

The standard in 29 CFR § 1926.501(b)(13) applies to the present case since residential construction was being performed at the Kamuela House on August 20, 2008, Barrientos was working on the roof that was about eleven (11) feet above the ground and thus was exposed to a fall hazard, and the use of a personal fall arrest system or other protection articulated in 29 CFR § 1926.501(b)(13) was feasible.[6]

2. There was a failure to comply with the cited standard.

Respondent failed to comply with the standard because there was no fall protection system at the Kamuela House on August 20, 2008. There was no personal fall arrest system, guardrail, or safety net system being utilized by Barrientos when Clark observed him on that day.

3. An employee had access to the violative condition.

Barrientos was working on the edge of the roof, the roof was approximately 11 feet from the ground, the ground below the roof was dirt and lava rock, and a fall off of the roof by Barrientos would likely have caused him to sustain a bone fracture injury. Accordingly, Barrientos was exposed to a fall hazard.

4. The employer knew or should have known of the condition with the exercise of due diligence.

For the reasons discussed in Sections II.C above and III.B. below, the Board finds that Respondent knew or should have known of Barrientos' failure to comply with the fall protection requirement under 29 CFR § 1926.501(b)(13), including the company's 100% tie-off rule.

It should be noted that after the evidence submitted and arguments made at the evidentiary hearing, Respondent does not challenge the substance of HIOSH's Inspection or the legal basis for the Citation or the issuance of the penalty, and only claims that payment of the penalty will be an "economic hardship" for Respondent.

B. The Characterization of the Subject Notice of Violation as "Willful" is Correct.

Citation 1, item 1, alleged a willful violation of 29 CFR 1926.501(b)(13) [chapter 12-121.2, HAR]. Section 396-3, HRS, defines willful violation as:

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[6] There is a presumption that it the fall protection systems articulated in 29 CFR § 1926.501(b)(13) are feasible and will not create a greater hazard to use these systems. Respondent did not claim to have developed and implemented a fall protection plan other than those set forth in 29 CFR § 1926.501(b)(13).

> [A] voluntary act or omission by the employer, as distinguished from an accidental act or omission, that is done with intentional disregard of, or plain indifference to, any standard, rule, citation, or order issued under the authority of this chapter. A willful violation does not require a showing of malicious intent or bad motive.

Actual knowledge of the unlawful condition at the time of the accident is not required to establish a willful violation of the Occupational Safety and Health Act. AJP Construction, inc. v. Secretary of Labor, 357 F.3d 70 at 74 (CA 2004), *citing* Secretary of Labor v. Propellex Corp., 18 OSH (BNA) 1677, 1684 (1999).

Respondent's actions constitute a "willful" violation of 29 CFR 1926.501(b)(13) because, among other things, (i) Respondent was aware of Barrientos' history of disregarding the company's 100% tie-off rule and nevertheless allowed Barrientos to work unsupervised at the Kamuela House on August 20, 2008, (ii) Respondent did not to take disciplinary action against workers who violate the company's work safety rules as evidenced by Respondent's failure to take action after reviewing the report of Maryl during the week of August 25, 2008, (iii) HIOSH's had issued six prior fall protection citations against Respondent, and (iv) Respondent nevertheless failed to make any effort to address its safety problems. Respondent has made no argument nor offered any evidence that the violation in issue is not "willful". The Board finds that there is sufficient evidence to establish a willful violation of 29 CFR 1926.501(b)(13).

C. The Penalty of $42,000 Assessed by the Director is Correct.

As stated in Section II.D. above, the penalty was calculated according to HIOSH's standard policies and procedures to avoid an arbitrary determination of a penalty.

Respondent has not raised a challenge to HIOSH's assessment of the penalty in Respondent's Post-Hearing Memo; therefore, the Board assumes that Respondent does not disagree with the $42,000 penalty if affirmed by the Board. The Board finds the penalty of $42,000.00 assessed by HIOSH to be correct, and is, therefore, affirmed.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board orders that the Citation resulting from HIOSH Inspection Number 311434054 commenced on August 20, 2008, including the characterization of the violation as "willful" and the penalty of $42,000.00, is hereby AFFIRMED.

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law, and Decision and Order may file exceptions with the Board within ten days after service of this document. The exceptions shall specify which proposed findings or conclusions are being accepted to, with full citations to the factual and legal authorities therefor. A hearing for the presentation of legal arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

Dated: Honolulu, Hawaii, November 6, 2015.

HAWAII LABOR RELATIONS BOARD

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SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

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