EFiled: Dec 03 2015 01:09PM HAST
Transaction ID 58246350
Case No. OSH 2012-15

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and R.D. OLSON CONSTRUCTION, INC., Respondent.	CASE NO. OSH 2012-15 ORDER NO. 725 FINAL ORDER ADOPTING ORDER NO. 714 AND ITS PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

FINAL ORDER ADOPTING ORDER NO. 714 AND ITS PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

On November 9, 2015, the Hawaii Labor Relations Board (Board) issued Order No.714, Proposed Findings of Fact, Conclusions of Law, and Decision and Order. No exceptions were filed by either party thereto pursuant to Hawaii Revised Statutes § 91-11, and the time limit set by the Board for the filing of such exceptions has passed. Accordingly, the Board hereby adopts in its entirety the attached Proposed Findings, Conclusions of Law, and Decision and Order contained in attached Order No. 714, as the Board's Final Decision and Order in this matter.

Dated: Honolulu, Hawaii, December 3, 2015.

HAWAII LABOR RELATIONS BOARD

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

DLIR v. R.D. OLSON CONSTRUCTION, INC.
CASE NO. 2012-15
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
ORDER NO. 725

ROCK B. LEY, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Order to a duly recognized representative of the employees.

Copies:

Lawrence H. Nakano, Deputy Attorney General
Kevin D. Bland, Esq. Attorney for Respondent R.D. Olson Construction, Inc.

EFiled: Nov 09 2015 02:41PM HAST
Transaction ID 58140295
Case No. OSH 2012-15

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, Complainant, and R.D. OLSON CONSTRUCTION, INC., Respondent.	CASE NO. OSH 2012-15 ORDER NO. 714 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), for the reasons discussed below, the Board finds in favor of Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director or DLIR). The Board members thoroughly reviewed all the evidence and arguments presented,[1] and the Board issues 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[.]

[1] While Board Chair Komatsubara did not participate in the hearing in this matter, he has reviewed the entire record, including the pleadings, transcripts, and exhibits filed in this case.

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 September 5, 2012, the Board received from the Director a Notice of Contest regarding a Citation and Notification of Penalty (Citation) issued to Respondent R.D. OLSON CONSTRUCTION INC. (Respondent), issued on July 20, 2012, and resulting from Inspection Number 313084725 which was conducted on March 19 and 20, 2012 (Inspection), by the Director's Occupational Safety and Health Division (HIOSH). The Director cited a "serious" violation of HAR § 12-110-2(f)(1)(A), 29 CFR § 1926.501(b)(1)[HAR § 12-110-50(a)], 29 CRF § 1926.1052(c)(12)[HAR § 12-110-50(a)] and an "Other" violation of HAR § 12-110-3(c), and assessed a total penalty of $2, 310.00. Respondent contested the Citation by a letter to HIOSH on August 3, 2012.

An initial conference/settlement conference was held on April 4, 2013, and evidentiary hearings were scheduled to commence on August 21, 2013.

On August 21 and 22, 2013, evidentiary hearings were held where oral testimony and documentary evidence were received by the Board. Following the evidentiary hearings, the Director submitted a closing brief/position statement and a reply brief on November 15 and December 30, 2013, respectively. Respondent submitted a closing brief on November 16, 2013.

II. FINDINGS OF FACT

A. The Inspection.

The Citation involves safety violations observed by HIOSH Compliance Officer Charles Clark (Clark) during the Inspection of construction work performed by Respondent at the four-story Courtyard by Marriott Hotel in Maui in early 2012. Respondent was the general contractor for the construction work, Heritage Interior was a subcontractor performing drywall work, and Kaona Masonry performed the masonry work. As the general contractor, Respondent managed the day-to-day operations on the worksite including work safety.

Clark was accompanied in his inspection by Respondent's project superintendent, Tom Van Schindel (Van Schindel). Clark and Van Schindel had an opening conference and performed

a walk-around of the Courtyard by Marriott Hotel (Courtyard-Marriott worksite) on March 19, 2012, and a closing conference on March 20, 2012.

1. Clark's Observations Regarding Forklifts (Citation 1 Item 1).

During the Inspection, Clark observed two forklifts on the Courtyard-Marriott worksite. One forklift was being operated by Stephen Nye, an employee of Heritage. Clark asked Nye for a forklift certification, and he did not have one. The other forklift that Clark saw in the Inspection was not in operation and was owned by Kaona Masonry. Clark interviewed the owner of Kaona Masonry, who informed Clark that he had used the forklift and further intended to use it to unload material. The Kaona Masonry owner also informed Clark that he did not have a forklift certificate and did not know it was a requirement.[2]

Clark testified at the evidentiary hearing that when he asked Van Schindel if he knew whether any of the forklift subcontractors were certified forklift operators, Van Schindel said no. Clark also testified that Van Schindel informed him that he had not checked whether either Nye or the Kaona Masonry forklift operator was certified to operate a forklift.

Clark testified at the evidentiary hearings that Respondent was aware that the forklifts were in use at the worksite because the forklifts were in plain view and Van Schindel actually saw the Heritage forklift in use. Clark testified that while he was conducting the Investigation, he observed the Heritage forklift with an elevated load and tines elevated to the second or third floor. Clark observed employees in the area that the Heritage forklift was being operated, and also saw employees in the area where the Koana Masonry forklift was parked. He assessed the violation as "serious" in light of the risk of injury involving forklift operators. He calculated the penalty by using the classification worksheet contained in his investigation file, which considered the seriousness of the injury and adjusted for additional factors.

2. Clark's Observations Regarding Unprotected Edge on Third Floor (Citation 1 Item 2).

Clark testified that during the Inspection, he observed an open shaft on the fourth floor[3] of one of the buildings at the Courtyard-Marriott worksite. This open shaft was referred to as the "duct chase" by Respondent, and it was barricaded with one railing that was 29.5 inches in height above the open shaft. Clark based the Citation on Van Schindel's statement to him that the distance between the partially barricaded opening to the next level of the open shaft was 34 feet. Clark

[2] The Director issued citations to Heritage Interior and Kaona Masonry for forklift violations, and they did not contest their citations and their cases are now closed.

[3] According to Respondent R.D. Olson Construction, Inc.'s Closing Brief at page 11, Clark's investigation report of the Inspection incorrectly states that the open shaft was on the third floor.

testified that he looked down the duct chase and did not see any obstruction for an estimated six to ten feet down. However, Clark admitted that he did not measure this distance with a tape measure. He also testified that employees were exposed to the risk of injury since the opening of the duct chase was on the side of a stairway that was accessible to employees. Clark used this stairway to get to the duct chase. Clark testified that two railings, and not just one, should be installed to protect people from falling into the duct chase. He testified that he felt that the lack of two railings, instead of one, was a "serious" violation of the safety standard because a fall of 34 feet could cause serious bodily injury. Clark considered this to be an obvious risk since anyone walking in the area should have seen this and taken corrective action. He calculated the penalties based on the classification worksheets contained in his investigative file.

3. Clark's observations regarding "unprotected" stairway landing in attic.

Clark testified that during the Inspection, he observed an unfinished stairway that accessed the attic. While the steps of the stairway were completed, there was no guardrail along the sides of the stairway nor was there any guardrail around the opening in the attic floor that connected to the stairway. Clark was told in the Inspection interviews that the roofing contractor used the stairway to access the roof, and Clark testified that the safety concern was the possibility of people falling through the opening in the attic floor or off the stairway and onto the ground below. Clark described the potential fall as being 70 inches, which was calculated by multiplying the 7 inch step by the 10 steps in the stairway. Clark testified that Van Schindel acknowledged that there should have been guardrails, and Clark characterized the violation as "serious" given the possibility of fractures if a person fell through the opening in the attic floor. Clark assessed the penalty based upon the factors identified in the classification worksheet contained in the investigative file.

4. Citations issued by Clark and abatement actions taken by Respondent.

As a result of the Inspection, the following citations and penalties were issued:

Citation 1 Item 1: A "serious" violation of HAR § 12-110-1(f)(1)(A) for failing to ensure that forklift operators for Heritage Interior and Kaona Masonry (which were subcontractors to Respondent) had completed the required forklift training and were certified to operate a forklift. Penalty: $825.00.

Citation 1 Item 2: A "serious" violation of 29 CFR § 1926.501(b)(l) [Refer to chapter 12-110-50(a) HAR] for failing to ensure that an unprotected edge on the third floor had a proper guard rail. Penalty: $825.00.

Citation 1 Item 3: A "serious" violation of 29 CFR § 1926.1052(c)(12) [Refer to chapter 12-110-50(a) HAR] for failing to install guardrails on the stairway landing. Penalty: $660.00.

Citation 2 Item 1: An "other than serious" violation of HAR § 12-110-3(c) for failing to maintain written records of daily safety inspections in a format that was acceptable to the Director. Penalty: $0.00.

Respondent submitted an Abatement Certificate on or about July 25, 2012, asserting that all abatements were completed at the time of the Inspection on March 19, 2012. The Abatement Certificate provided that with respect to Citation 1 Item 1, "R.D. Olson Construction reaffirmed with subcontractor foremen that only operators that attended the [illegible] forklift training operated forklifts." With respect to Citation 1 Item 2, the Abatement Certificate provided that "Initial guardrails reinstalled at 26" and 42" from floor." With respect to Citation 1 Item 3, the Abatement Certificate stated that "Original handrail/guardrail reinstalled at 26 inches and 42 inches from the floor." The Abatement Certificate was signed by Karel Taska (Taska) for Respondent.

B. Respondent's Challenge to the Citations.

Respondent initially contested all four Items of Citation 1, however, Respondent withdrew its contest of Citation 2 Item 1 at the beginning of the hearing.

Respondent contested Citation 1 Item 1 on the basis that it offered forklift training classes for all subcontractors that were working onsite on August 27, 2011, that it had completed safety inspections of heavy equipment operator use and certifications used on the job site, and that it took in good faith the operators' certification cards presented to Respondent by its subcontractors. In addition, Respondent argues that the Director should be precluded from using information from Heritage Interior and Kaona Masonry's case files because the Director failed to produce copies of these case files, which were requested by Respondent in its discovery request. (See Respondent's Closing Brief at pages 4 and 5.) By withholding this information, Respondent claims that HIOSH misled it "to believe that they had all the information that [Clark] used as a basis for issuing the citation when in truth this was not the case." Id. As such, Respondent argues that HIOSH "should be precluded from using evidence contained exclusively in the case files of Heritage Interior and Kaona Masonry, particularly the interview statements from the forklift operators." Id. Lastly, Respondent in its Closing Brief contends that the Director failed to establish at the evidentiary hearings that: (i) Respondent violated the standard set forth in HAR § 12-110-2(f)(1)(A); and (ii) that the violation was "serious."

Regarding Citation 1 Item 2, Respondent's contest was based on Clark's alleged failure to establish that the "fall hazard" was six feet or more in height; and therefore, the standard cited by the Director, 29 CFR § 1926.501(b)(1), does not apply. Although Clark testified at the evidentiary hearings that the fall distance was 34 feet, Respondent challenged Clark's understanding of the duct chase and alleged through its witnesses that the fall distance through the duct chase was only 5.5 feet. Furthermore, Respondent claims that the Director failed to establish at the evidentiary hearings that workers were exposed to the alleged hazard.

Regarding Citation 1 Item 3, Respondent's contest was centered around the definition of "stairway landing" as it applies to the safety standard 29 CFR § 1926.1052(c)(12). Respondent contends that 29 CFR § 1926.1052(c)(12) requires guardrails along a "stairway landing", and that the opening in the attic floor that connects to the stairway is not a "stairway landing" that triggers the guardrail requirement. Furthermore, Respondent argued that the maximum fall exposure height was less than six feet, and thus, did not require "fall" protection; and that the opening in the attic floor, which was usually covered with a plywood sheet was left uncovered for the limited purpose of performing the Inspection. Respondent also notes in its Closing Brief that moving through the opening in the attic floor was "tight," and Van Schindel testified in the evidentiary hearings that "[y]ou always have to duck and almost crawl."

C. Issues at the Evidentiary Hearings.

The issues to be determined at the evidentiary hearings were:

For Citation 1 Item 1:

1. Whether Respondent violated HAR § 12-110-2(f)(1)(A) as set forth in Citation 1 Item 1;
2. Whether the characterization of the subject notice of violation as "serious" is correct; and
3. Whether the penalty of $825.00 assessed by the Director is correct.

For Citation 1 Item 2:

1. Whether Respondent violated 29 CFR § 1926.501(b)(1) [refer to HAR § 12-110-50(a)] as set forth in Citation 1 Item 2;
2. Whether the characterization of the subject notice of violation as "serious" is correct; and
3. Whether the penalty of $825.00 assessed by the Director is correct.

For Citation 1 Item 3:

1. Whether Respondent violated 29 CFR § 1926.1052(c)(12) [refer to HAR § 12-110-50(a)] as set forth in Citation 1 Item 3;
2. Whether the characterization of the subject notice of violation as "serious" is correct; and
3. Whether the penalty of $660.00 assessed by the Director is correct.

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:

* * *

(5) Every person having direction, management, control, or custody of any employment, place of employment, or any employee.

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).

Section 396-3, HRS, defines "serious violation" as "a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation." Two elements are required under the statute for the imposition of a serious characterization: 1) a substantial probability of death or serious physical harm from the existence of the violative condition; and 2) employer knowledge of the violative condition.

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; and 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

by keeping the scale evenly balanced (*see*, Kekona v. Abastillas, 113 Hawaii 174, 180, 150 P.3d 823, 829 (2006) (citation omitted)).

A. For Citation 1 Item 1:

1. Respondent Violated HAR § 12-110-2(f)(1)(A) as Set forth in Citation 1 Item 1.

a. The cited standard applies.

HAR § 12-110- 2(f)(1)(A) provides:

(f) Prime contractor and sub-contractor responsibilities.

(1) By contracting for full performance of a contract, the prime contractor assumes all obligations prescribed as employer responsibilities under the law, whether or not any part of the work is subcontracted.

(A) Where one contractor is selected to execute the work of a project, that contractor shall ensure compliance with the requirements of the standards of part 3 of this title from the contractor's own employees as well as from all subcontractor employees on the project.

HAR § 12-110-50, set forth in part 3 of the same title, incorporates by reference the federal Occupational Safety and Health Administration ("OSHA") safety standards for the construction industry set forth at 29 CFR part 1926. Under 29 C.F.R. § 1926.602(d), employees engaged in construction who use power industrial trucks must be trained in accordance with the requirements in 29 C.F.R. § 1910.178(1). Section 1910.178(1) sets forth the training and certification requirements for power industrial trucks. Relevant sub-sections of Section 1910.178(1) include the following:

1910.178(1)(1)(i) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (1).

1910.178(1)(1)(ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (1), except as permitted by paragraph (1)(5).

1910.178(1)(4) Refresher training and evaluation.
(i) Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by paragraph (1)(4)(ii) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely . . . .

(iii) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

1910.178(1)(6) Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (1). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

Clark testified that he determined in the Inspection that Respondent was the general contractor for the construction work, and under HAR § 12-110-2(f)(1)(A), the general contractor assumes all work safety obligations of the subcontractors Heritage Interior and Kaona Masonry. The assumption includes the requirement that each operator of a forklift be certified in accordance with CRF § 1910.178(1). In this case, because Respondent admits that it was the general contractor for the work at the site and acknowledges, as evidenced by its actions at the worksite, its obligation to insure that all operators of forklifts be properly certified, the citing standard applies to Respondent.

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

In establishing Respondent's failure to comply with the cited standard, the Director relies upon the testimony of Clark and his report of the Investigation. The violations in Citation 1 Item 1 involve the unlicensed operation of forklifts by Heritage Interior and Kaona Masonry. Clark testified that he saw Stephen Nye of Heritage Interior operate a forklift at the Marriott Courtyard worksite without a forklift certification. Clark also saw during the Inspection a forklift that was not in operation, but the owner of Kaona Masonry admitted to Clark that he had not only used the forklift, but further intended to use it that day to unload material from a flatbed truck. The Kaona Masonry owner also admitted to Clark that he did not have a forklift certificate and did not know that it was a requirement.

Respondent objects to the use of the information in Clark's case files for Heritage Interior and Kaona Masonry. During the Inspection, Clark opened three separate case files for the inspections of Respondent, Heritage Interior and Kaona Masonry. Clark conducted interviews with Heritage Interior and Kaona Masonry employees and collected information regarding their forklift operations. This information was included in the subcontractors' case files but not in Respondent's case file. Respondent made a discovery request to the Director to produce all documents used as a basis to issue Citation 1 Item 1 and all documents that the Director's witnesses examined or relied upon in giving or preparing for their testimony in this case. The Director's response to Respondent's discovery requests did not include the documents from the Heritage Interior or Kaona Masonry case files. Respondent now raises this objection and asks the Board to preclude the Director from using the information contained *exclusively* in the Heritage Interior and Kaona Masonry's case files, particularly the statements from the forklift operators. Respondent points out that Clark conceded that he used information in the Heritage Interior and Kaona Masonry case files as the primary basis for issuing Citation 1 Item 1, and argues the Director has denied Respondent the opportunity to defend itself fully by withholding critical information.

The failure of Respondent to produce the documents contained in the Heritage Interior and Kaona Masonry case files was addressed by Chairman Nicholson in the early proceedings of the evidentiary hearing. Chairman Nicholson ordered the Director to produce to Respondent the documents in the case files for Heritage Interior and Kaona Masonry during the testimony of the first witness on the first day of the evidentiary hearings. (See Vol. 1 of Transcript at page 25 through 27.) The Board was not informed whether the Director complied with the Board's order However, subsequent to the Board Chair's order, Respondent neither raised the issue of the Director's failure to comply with the order nor filed a motion to strike this evidence during the evidentiary hearings. At trial, Respondent's counsel asked Clark on the record only whether certain information should be in the Kaona Masonry case file if Respondent subpoenas this information in the future on appeal. (See Vol. 1 of Transcript at page 53). Instead, in its closing brief, after the hearing was concluded, Respondent renews its objection to this evidence and requests for the first time that this evidence be stricken. Under these circumstances, the Board finds that Respondent's request is untimely. Furthermore, the Board questions the credibility of Respondent's claim of surprise and prejudice since the substance of Clark's testimony regarding his interviews of Heritage Interior and Kaona Masonry workers was addressed in his June 24, 2013 deposition taken by Respondent about one month before the evidentiary hearings. For all of these reasons, the Board does not preclude the Director from using the information exclusively contained in Heritage Interior and Kaona Masonry's case files.

In addition, the Board notes the abundance of evidence "outside" of the Heritage Interior and Kaona Masonry case files that establish Respondent's violation of the cited standards involving forklift certification. The Board received Clark's testimony during the evidentiary hearings that when he asked Van Schindel if he knew if any of the forklift subcontractors were certified forklift operators, his response was "no." Clark also testified that Van Schindel admitted to him that he had not checked whether either Nye or the Kaona Masonry forklift operator was certified to operate a forklift. Clark's testimony was based on his interview of Van Schindel, which was contained in Respondent's case file and not in the case files of Heritage Interior and Kaona Masonry.

In arguing that the Director failed to establish Respondent's violation of the safety standards regarding forklifts, Respondent contends that the cited standards do not require Respondent to view the forklift operator's certification, and that it met its obligations in other ways. Respondent claims that Section 1910.178(l)(1) does not specify how an employer must ensure that forklift operator certification has been met, and that the steps it took in this case are in compliance with Section 1910.178(l)(1). For example, Respondent cites that it required all subcontractors on site to sign a pledge that equipment operators on the job site must be trained and certified by their companies to operate the equipment. Van Schindel kept copies of the forklift certifications and list of certified forklift operators in the office. Respondent even offered a forklift training class for all subcontractors that were working onsite. Taska also checked for forklift certifications during his inspections of the worksite, and he testified that if he observed a forklift in operation, he would approach the operator to discuss forklift safety and ask to see their operating card.

The Board does not agree with Respondent's interpretation of its duties under the cited standards. We find the interpretation of the Director that the cited standards required Respondent to rely on the certification card which contains the name of the operator, the date of the training, the date of the evaluation and the identity of the person(s) performing the training or evaluation to be appropriate. Respondent's reliance on other evidence of forklift certification is an example of the problem with what Respondent asks this Board to accept. Van Schindel reviewed the union membership card that Nye presented to him, and he believed Nye's misrepresentation that the union trained and certified him to operate the forklift. Nye made the same misrepresentation to Taska, who also let Nye's claim go unchecked. Interestingly, however, Nye was truthful when he admitted to Clark that he did not have a forklift certification. The Board finds that Nye's deception with Van Schindel and Taska does not excuse Respondent from its responsibility to comply with the cited standards and insist upon the presentation of the forklift certification cards from the forklift operators.

Lastly, Respondent argues that no violation occurred because Clark did not observe the owner of Kaona Masonry operating a forklift during his inspection. Based on Clark's testimony, however, the Board finds this argument not only misleading but a distortion of the facts. Clark testified that the owner of Kaona Masonry not only admitted that he operated the forklift at the worksite before the Inspection, but also that he was not a certified forklift operator. Thus, this argument by Respondent based on incorrect facts has no merit.

Based on the evidence submitted at the evidentiary hearings, and weighing the credibility of the witnesses, the Board finds that the Director has demonstrated that Respondent failed to comply with the cited standards in Citation 1 Item 1.

c. An employee had access to the violative condition.

Clark testified that while he was conducting the Investigation, he observed employees of Heritage Interior in the area of the forklift. He also testified that the forklift owned by Kaona Masonry was in an area where other employees were present.

Respondent does not dispute Clark's observations nor does it produce any evidence to contradict his assertion that employees had access to the violative condition. As such, the Board finds in favor of the Director on this issue.

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

Clark testified at the evidentiary hearings that Respondent was aware that the forklifts were being used at the worksite because the forklifts were in plain view. Clark also testified that Van

Schindel actually saw the Heritage Interior forklift in use while Clark was performing the Inspection.

Respondent does not dispute that it was aware of forklift operations at the worksite, nor does Respondent dispute that all forklift operators are required to have current and valid forklift operators' certification. In fact, Respondent submitted evidence at the evidentiary hearings that Van Schindel asked Nye for his forklift certification, which indicates that Respondent knew that forklifts were being operated at the worksite. Van Schindel also testified that Kaona Masonry's forklift arrived at the worksite the evening before the Inspection.

As such, the Board finds based on the evidence that Respondent knew or should have known of the violative condition at the worksite.

2. The Characterization of the Subject Notice of Violation as "serious" is Correct.

Two elements are required for the imposition of a serious characterization: (1) a substantial probability of death or serious physical harm from the existence of the violative condition; and (2) employer knowledge of the violative condition.

Regarding the first element, Clark testified that he assessed the violation as "serious" because of the possible type of injury involving an accident with a forklift, such as being struck by a forklift, resulting in "death."[4] In support of Clark's position, the Director cites two Occupational Safety and Health Review Commission Administrative Law Judge decisions: *Giant Distribution Center, Inc.* 14 BNA OSHC 1416 (No. 88-1610 1989) (ALJ) (*Giant Distribution*), and *Virginia Construction & Management Company, Inc.*, 24 BNA OSHC 1010 (No. 11-0328, 2012) (*Virginia Construction*) (ALJ).

Respondent attempts to distinguish the *Giant Distribution* and *Virginia Construction* cases from the case at hand. Regarding *Giant Distribution*, Respondent notes that OSHA has since amended the forklift training requirements that were in effect pre-1988 and the case at hand and now operates under different OHSA standards than those in effect during *Giant Distribution*. Also, Respondent points out that the employer in that case provided no forklift training to its workers unlike the training provided by Respondent. Regarding *Virginia Construction*, Respondent brings to the Board's attention that the violation in that case was deemed serious, in part, based on the evidence that the forklift operator had operated the forklift in an unsafe manner. In this case, however, there is no such evidence against the Heritage Interior and Kaona Masonry forklift operators.

Respondent is correct that the factual circumstances in both *Giant Distribution* and *Virginia Construction* are different from the case at hand, but the Respondent misses the point on this issue. The applicable test in characterizing the seriousness of the violation should not focus on the act of the worker which violates the safety standard, but instead on the type of injury that

[4] See Vol. 1 of Transcript at pages 31 and 32.

probably would result in the event of an accident. The Board agrees with Clark's characterization of the violation as "serious" based on the substantial probability of serious injury from an accident resulting from the misuse of a forklift, which in this case could be the death of a worker. This approach to characterizing the seriousness of a violation based upon the seriousness of a resulting injury is consistent with the approach and reasoning taken in other cases involving use of forklifts. For example, in *E. Tex. Motor Freight, Inc. v. OHSRC*, 671 F.2d 845 (1982), the Fifth Circuit affirmed the administrative law judge's characterization of a forklift safety violation as serious because injuries that could result from a work safety violation involving a forklift ranged from "crushed toes to death." *Id.* At 849.

Similarly, in *Accident Prevention Div. v. Roseburg Forest Products*, 806 P.2d 172, 173 - 74 (Or. Ct. App. 1991), the Oregon Court of Appeals came to the conclusion that "it was reasonably predictable, given the heavy loads carried on the forklift, that serious physical harm or death could result" from a violation of work safety standards. Accordingly, for similar reasons, the Board concludes that Clark's characterization of the violations in this case as "serious" is warranted based on the substantial probability that a serious injury, including death, could occur from the improper operation of a piece of machinery such as a forklift, which is a high powered motor vehicle that lifts and moves heavy and bulky loads.

Regarding the second element, the Board heard Respondent's witnesses at the evidentiary hearing verify that Respondent knew that every forklift operator was required to be certified and that the certification documentation must contain the name of the operator, the date of the training, the date of the evaluation and the identity of the person performing the training or evaluation. In addition to their testimony, the actions taken by Van Schindel and Taska to inquire with the forklift operators about their certification and the offering of training classes clearly indicates that Respondent knew that forklift operation is a "serious" task that requires Respondent to be "pro-active" in ensuring compliance. Thus, Respondent's argument that it believed, based on documentation of the union membership card or the union's financial institution membership card, that the operator was certified to operate a forklift is not believable. The union card did not contain any of this information. On cross-examination, Van Schindel admitted that Nye did not have a forklift certification card. Van Schindel also confirmed that he did not ask Kaona Masonry whether its forklift operator had proper certification. Rather, he "took it for granted" that Kaona Masonry used a certified forklift operator because he was the "owner operator," who said he was trained on the forklift. Also, Taska testified that although he asked Kaona Masonry for documentation of forklift certification before it started the job, it was never provided. As such, the Board finds that Respondent knew, or at least should have known, that the forklifts at the worksite were being operated in violation of the cited standards.

In conclusion, the Board agrees with Clark's characterization of the violation as "serious" and finds in favor of the Director on this issue.

3. <u>The penalty of $825 assessed by the Director is incorrect and must be reduced to $750</u>.

Clark testified at the evidentiary hearings that he determined the $825 penalty by using his field worksheet and classification worksheet that are part of his investigative file. His calculations took into account the characterization of the violation as "serious," a "high" severity since the probable type of injury was "death," and a "lesser" probability of the likelihood that an injury, but not death, would occur. According to Clark, the gravity-based penalty calculated to $2,500. This amount was reduced by 60 percent because Respondent was a small company with between 1 and 25 employees and by 10 percent because there were no prior violations in the past three years against Respondent. With the 70 percent reduction, the penalty was calculated by Clark to be $825.

Respondent has not challenged Clark or the Director's calculations in determining the $825 penalty.

The Board takes note that Clark and the Director miscalculated the penalty. The gravity-based penalty of $2,500, reduced by 70 percent by the adjustment factors, computes to a penalty of $750 and not $825. As such, the penalty is reduced to $750.

B. For Citation 1 Item 2: The Director failed to meet its burden to prove that Respondent violated OSHA Standard 29 C.F.R. § 1926.501(b)(1) as set forth in the Citation 1 Item 2, because the Director failed to establish that the cited standard applies.

The applicable safety standard in Citation 1 Item 2, 29 CFR § 1926.501(b)(1),[5] reads as follows:

> (1) "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 guardrail systems,[6] safety net systems, or personal fall arrest systems.

---

[5] Hawaii Administrative Rules (HAR) § 12-110-50 incorporates 29 C.F.R. § 1926.501(b)(1) as part of the chapter and provides as follows:

(a) Incorporation of federal standard. Title 29, Part 1926 of the Code of Federal Regulations, 2012 Edition published as of July 1, 2012, by the U.S. Government Printing Office, U.S. Superintendent of Documents, Washington, DC 20402-0001, is made a part of this chapter except as provided in subsections (b) through (e).

[6] The standard for guardrails systems as contained in 29 CFR § 1926.502(b) is as follows:

(b) "Guardrail systems." Guardrail systems and their use shall comply with the

At the evidentiary hearings, Clark testified that during the Inspection, he observed an open shaft, which was barricaded with one guardrail that was 29.5 inches in height above the opening. According to Clark, the fall distance in the open shaft was 34 feet based on the statement from Van Schindel during the Inspection. Thus, Clark concluded that 29 CFR § 1926.501(b)(1) was applicable since the fall distance in the open shaft was more than 6 feet and the open shaft should be protected with two guardrails and not just one.

Respondent challenges the application of the cited standard based on Clark's alleged failure to establish that the fall distance in the open shaft was six feet or more in length. Although Clark testified at the evidentiary hearings that the fall distance was 34 feet based on Van Schindel's representations to him during the Inspection, Van Schindel testified at the evidentiary hearings that his statement to Clark was not about the fall distance, but rather in response to Clark's question to him about the height from the fourth floor to the ground floor.[7] Respondent further challenged Clark's understanding of the component parts of the open shaft and alleged through its witnesses that the fall distance through the open shaft was only 5.5 feet. Van Schindel explained that a fall distance of 34 feet was impossible because of the air duct contained within the open shaft. The air duct was constructed vertically in four-foot sections starting at the ceiling of the first floor and eventually ending up going into the roof of the building. As the air duct is constructed, the top is capped with plastic and a wooden platform to keep debris out and provide safety. Van Schindel and Taska testified that the air duct was approximately three feet above the third floor and covered

---

following provisions:

(1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph. Note: When employees are using stilts, the top edge height of the top rail, or equivalent member, shall be increased an amount equal to the height of the stilts.

(2) Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches (53 cm) high.

(i) Midrails, when used, shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

(ii) Screens and mesh, when used, shall extend from the top rail to the walking/working level and along the entire opening between top rail supports.

(iii) Intermediate members (such as balusters), when used between posts, shall be not more than 19 inches (48 cm) apart.

(iv) Other structural members (such as additional midrails and architectural panels) shall be installed such that there are no openings in the guardrail system that are more than 19 inches (.5 m) wide.

(3) Guardrail systems shall be capable of withstanding, without failure, a force of at least 200 pounds (890 N) applied within 2 inches (5.1 cm) of the top edge, in any outward or downward direction, at any point along the top edge.

(Emphasis added)

[7] Each floor is ten feet apart, except for the first floor which is 14 feet.

with a piece of plywood that was approximately four feet above the third floor. Van Schindel estimated the fall distance in the open shaft from the fourth floor to the plywood over the air duct was only about 5.5 feet.

Clark testified during direct examination that he looked down the open shaft and did not see any obstruction for an estimated six to ten feet. However, Clark admitted that he did not measure this distance with a tape measure. On cross examination, Clark testified that he "never looked down to see what was in that opening," and he didn't "see if there's any duct work or anything in it." (Vol I, Transcript at page 77.) Clark also was not able to testify with specificity regarding his knowledge as to the "inside" of the open shaft, and he had no knowledge of the air duct that was constructed within the open shaft and that shortened the fall distance. Taska testified that he made the same mistake during a prior safety inspection in January 2011. In this prior inspection, Taska initially thought that he needed a guardrail to protect from a fall that was over six feet in the open shaft, however, Heritage Interior showed him the platform inside of the open shaft. Lastly, Clark's photo of the open shaft (See Exhibit 1, with identification #122602) is of limited value since the photo captures only a few feet into the open shaft.

Based on the evidence presented during the evidentiary hearings, the Board finds that the Director did not establish that the fall distance in the open shaft was six feet or more. As such, the Board finds that the Director has not met its burden to establish that the cited standard, 29 C.F.R. § 1926.501(b)(1), applies to hazard described in Citation 1 Item 2. Further discussion on the remaining issues regarding Citation 1 Item 2 is therefore unnecessary, and Citation 1 Item 2 must be vacated.

C. For Citation 1 Item 3:

1. Respondent Violated OSHA Standard 29 CFR § 1926.1052(c)(12) as Set forth in Citation 1 Item 3.

a. The cited standard applies.

The applicable standard in Citation 1 Item 3, 29 CFR § 1926.1052(c)(12)[8] reads as follows:

[8] HAR § 12-110-50 incorporates 29 C.F.R. § 1926.501(b)(1) as part of the chapter and provides as follows:

> (a) Incorporation of federal standard. Title 29, Part 1926 of the Code of Federal Regulations, 2012 Edition published as of July 1, 2012, by the U.S. Government Printing Office, U.S. Superintendent of Documents, Washington, DC 20402-0001, is made a part of this chapter except as provided in subsections (b) through (e).

(12) Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail system criteria are contained in subpart M of this part.[9]

Respondent's challenge to Citation 1 Item 3 is based on its contention that the cited standard, 29 C.F.R. § 1926.501(b)(1), is not applicable to the stairway and the opening in the attic floor. The question here is what is the meaning of a "stairway landing" in the cited standard. Is the attic floor at the top of the stairway a "stairway landing," such that the cited standard requires Respondent to install a guardrail system around the opening?

Nothing in 29 CFR § 1926.1052(c)(12) or Subpart M provides any clarification as to the meaning of "stairway landing." The Director suggests that the term should be understood from its most known and usual meaning and advocates the usage of the definitions of "landing" in dictionaries such as *Webster's New Collegiate Dictionary, American Heritage Dictionary of English Language* and *Dictionary of Construction.com*. The definitions of the word "landing" in these dictionaries describe a level platform at the stairway top or bottom or where there is a change in direction. Respondent argues that the term "stairway landing" is defined in a recognized authority in construction business, B & I Building News, as "the level platform between flights of stairs . . . ." Van Schindel testified that B & I Building News is commonly relied on in the construction industry as a reputable source of information.

Regarding the fall distance from the stairway landing, the Director argues that the need for guardrails under the cited standard is mandated irrespective of any fall distance. In any event, Clark testified, that the direct fall distance from the stairway landing (which is the attic floor) to the floor level at the bottom of the stairway is 77 inches, which is more than 6 feet. On this point, Respondent disagrees with the Director's assertion and cites Subpart M which requires an employer to provide fall protection under the cited standard only when an employee is exposed to a fall hazard of 6 feet or more.

The Board finds that the cited standard requires Respondent to install a guardrail system around the opening of the attic floor at the top of the stairway. After review of the cited standard, the Board finds that 29 CFR § 1926.1052(c)(12) contains language to support the Director's contention that the attic floor at the top of the stairway is a "stairway landing." Although the definition of "stairway landing" in construction business magazines cited by Respondent indicates that the term refers to a platform between flights of stairs and not at the top of stairways, the standard dictionary meaning of "landing" indicates that it could be a level area at the top of the stairway. The Board finds the usage of this definition, which is advocated by the Director, is proper when applied to this specific situation where the "landing" area is at the top of a flight of stairs with a fall of 77 inches below, and which stairs do not have any guardrail along its edges.

---

[9] The guardrail system criteria contained in Subpart M refers to 29 CFR § 1926.502(b), refers to the same subsection that is set out in the discussion of Citation 1 Item 2 above.

Furthermore, the image depicted by Respondent of an opening in the floor of an attic with a low ceiling and limited mobility is incorrect. The attic at the top of the stairway does not have limited overhead clear space and is not mere "crawl space." Instead, the attic has a ceiling height that allows workers to walk and work freely in the attic and an unguarded opening in the attic floor is a potential danger for workers in the attic. Respondent's point that Van Schindel testified in the evidentiary hearings that "[y]ou always have to duck and almost crawl" to get through the opening in the attic floor is in reference to moving upward from the stairways through the opening; however, the safety concern is much different when considering a worker falling through the unguarded opening in the attic floor. The Board finds that there is a substantial probability of workers falling through this opening by mistake and being seriously injured. Thus, for all of these reasons the Board finds in favor of the Director in the application of the cited standard to find a violation for having no guardrail system around the opening in the attic floor at the top of the stairway.

The Board wishes to express its concern, however, that the greater safety concern involving the lack of a guardrail system is regarding Respondent's failure to install a guardrail along the edges of the stairway. The cited standard to Citation 1 Item 3, however, addresses "unprotected sides and edges of stairway landings" and not the stairway itself. Although the Board believes that there probably are applicable safety standards that require fall protection for sides and edges of stairways, none were cited in Citation 1 Item 3 of the Citation. The arguments of the Director at the evidentiary hearing and in its closing briefs focused exclusively on the legal requirements for fall protection for the "stairway landing" and not the stairway itself. As such, the Board cannot and does not find a violation by Respondent regarding its failure to install a guardrail along the edges of the stairway.

Therefore, the Board finds that the Director established that the cited standard, 29 CFR § 1926.1052(c)(12), is applicable to the hazard described in Citation 1 Item 3.

b. <u>There was a failure to comply with the cited standard</u>.

In establishing Respondent's failure to comply with the cited standard, the Director relies upon the testimony of Clark and his report of the Investigation. Respondent does not dispute that there was no guardrail protecting the opening in the attic floor at the top of the stairways.

As such, the Board find in favor of the Director on this issue.

c. <u>An employee had access to the violative condition</u>.

Clark testified that employees had access to the violative condition since employees used the stairway and went through the opening in the attic floor at the top of the stairway, to gain access

to the roof where there was ongoing construction. He also testified that he interviewed workers at the worksite and was informed that the roofing contractor on the roof used this means to gain access to the roof.

Respondent does not dispute Clark's observations nor does it produce any evidence to contradict his assertion that employees had access to the violative condition. As such, the Board finds in favor of the Director on this issue.

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

Clark testified at the evidentiary hearings that the violative condition was in plain view and was an obvious risk. He testified that during the Inspection, Van Schindel acknowledged to him that there should have been guardrails around the opening in the attic floor. Furthermore, guardrails previously protected the opening, however, the original guardrails were removed and subsequently reinstalled as part of the abatement effort by Respondent.

As such, the Board finds based on the evidence that Respondent knew or should have known of the violative condition at the worksite.

2. The Characterization of the Subject Notice of Violation as "serious" is Correct.

Clark testified that he characterized the violation as "serious" given the possibility of "fractures" if a worker fell through the opening in the attic floor. Respondent does not challenge Clark's characterization.

The Board agrees with Clark's characterization of the violation as "serious" and finds in favor of the Director on this issue.

3. The penalty of $660 assessed by the Director is incorrect and must be reduced to $600.

Based on the Inspection, Clark determined the $660 penalty by using his field worksheet and classification worksheet that are part of his investigative file. His calculations took into account the characterization of the violation as "serious," a "medium" severity, and a "lesser" probability of the likelihood that an injury, would occur. According to Clark, the gravity-based penalty calculated to $2,000. This amount was reduced by 60 percent because Respondent was a small company with between 1 and 25 employees and by 10 percent because there were no prior violations in the past three years against Respondent. With the 70 percent reduction, the penalty was calculated by Clark to be $660.

Respondent has not challenged Clark or the Director's calculations in determining the $660 penalty.

The Board takes note that Clark and the Director miscalculated the penalty. The gravity-based penalty of $2,000, reduced by 70 percent by the adjustment factors, computes to a penalty of $600 and not $660. As such, the penalty is reduced to $600.

IV. DECISION AND ORDER.

For the reasons discussed above, the Board affirms, in part, and vacates in part the Citation resulting from HIOSH Inspection Number 313084725, conducted on March 19 and 20, 2012. The Board hereby affirms Citation 1 Items 1 and 3, including the characterization as "serious," however the penalties of $825 and $600 shall be reduced to $750 and $600, respectively; but vacates Citation 1 Item 2 and the penalty of $825.

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 excepted 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 9, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD * STATE OF HAWAII *

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

DLIR v. R.D. OLSON CONSTRUCTION, INC.
CASE NO. 2012-15
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
ORDER NO. 714

NOTICE TO EMPLOYER

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

Copies:

Lawrence H. Nakano, Deputy Attorney General
Kevin D. Bland, Esq., Attorney for Respondent R.D. Olson Construction, Inc.