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**Transaction ID 62022058**  
**Case No. OSH 2018-01**

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## HAWAI'I LABOR RELATIONS BOARD

### STATE OF HAWAII

In the Matter of	)	CASE NO. OSH 2018-01
	)	(Inspection No. 1237898)
DIRECTOR, DEPARTMENT OF	)	
LABOR AND INDUSTRIAL	)	
RELATIONS,	)	ORDER NO. 987
	)	
Complainant,	)	STIPULATION OF FACTS and ORDER
	)	
vs.	)	
	)	
PIONEER MARBLE & GRANITE	)	
CORPORATION,	)	
	)	
Respondent.	)	

### STIPULATION OF FACTS

Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL  
RELATIONS ("Director"), and Respondent PIONEER MARBLE & GRANITE  
CORPORATION ("Respondent"), by and through their respective counsel, hereby

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

stipulate and agree that the facts set forth herein shall be, and are hereby, conclusively established for purposes of this contested case proceeding under sections 396-11 and 396-11.5 of the Hawaii Revised Statutes (“HRS”).

This Stipulation of Facts (“Stipulation”) is made solely for purposes of the present contest case proceeding, and does not constitute an admission of any fact for any other purpose or with respect to any third party, or any other administrative or judicial proceeding.

Nothing in this Stipulation shall preclude either party from offering any additional evidence at trial, except that evidence offered for the sole purpose of contradicting a stipulated fact shall not be allowed.

This Stipulation may be amended only by a further stipulation signed by the parties and/or their respective counsel.

1. The Hawaii Labor Relations Board (“Board”) has jurisdiction over this contested case pursuant to section 396-11, HRS.

2. At all relevant times mentioned in this Stipulation, Respondent maintained a workplace at 148 Mokauea Street, Unit 1, Honolulu, Hawaii, 96819.

3. At all relevant times, Respondent was an employer, as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and was subject to the requirements of HRS chapter 396, the Hawaii Occupational Safety and Health Law.

4. On January 5, 2015, the Hawaii Occupational Safety and Health Division (“HIOSH”) conducted an occupational safety inspection of Respondent’s workplace. On April 1, 2015, HIOSH issued a Citation and Notification of Penalty (“Citation”) against Respondent. See, Exh. C-2. Citation 1, item 1, alleged a serious

violation of 29 CFR 1910.178(a)(4) [section 12-60-50(a) of the Hawaii Administrative Rules (“HAR”)], with an abatement date of April 21, 2015. Specifically, the violation alleged that a telescopic boom attachment with an Abaco lifter was added to the tines of a Toyota vertical mast forklift, without the manufacturer’s prior written approval, affecting the forklift’s capacity and safe operation and exposing employees to potential struck by/crushed by hazards. The proposed penalty for citation 1, item 1, was \$1,050.00.

5. On April 23, 2015, Respondent and the Director entered into an Informal Settlement Agreement (“ISA”). See, Exh. C-3. Among other stipulated things, the ISA reduced the penalty for citation 1, item 1 of the Citation, from \$1,050.00 to \$840.00, and postponed the abatement date for citation 1, item 1, from April 21, 2015 to May 23, 2015. The ISA did not otherwise alter the violation alleged in citation 1, item 1, 29 CFR 1910.178(a)(4). The ISA was not contested by any party, and hence, the Citation and the ISA became a final order of the Director.

6. On July 9, 2015, HIOSH conducted a follow-up inspection of Respondent’s workplace to determine whether Respondent abated or corrected the violation cited in citation 1, item 1 of the Citation. Specifically, HIOSH was attempting to determine whether Respondent obtained written approval from the manufacturer for the attachment and use of the telescopic boom and lifter on the Toyota forklift. HIOSH determined that the violation continued to exist unabated since its earlier inspection of January 5, 2015. On August 3, 2015, HIOSH issued a Notification of Failure to Abate Alleged Violations (“FTA Citation”) against Respondent for failing to abate or correct the hazardous condition and/or practice alleged in citation 1, item 1, of the Citation.

Specifically, the FTA Citation alleged a FTA-serious violation of 29 CFR 1910.178(a)(4) [section 12-60-50(a), HAR]. A \$42,000.00 penalty was proposed. See, Exh. C-4.

7. Respondent contested the FTA Citation. On May 23, 2016, the HLRB upheld the FTA Citation and proposed penalty. See, Exh. C-5. The HLRB's decision and order of May 23, 2016, was not contested by any party, and therefore, it became a final order.

8. On June 5, 2017, HIOSH initiated a second follow-up inspection of Respondent's workplace to determine whether Respondent abated or corrected the violation cited in the FTA Citation.

9. HIOSH determined the following after interviewing employees and Respondent's owner, John Pham:

a. Respondent is engaged in the fabrication of natural and man-made stone into finished products.

b. In the course of its activities at its workplace Respondent occasionally moves stones using a Toyota forklift with a telescopic boom and lifter. John Pham operated the forklift approximately twice a week, about 2 to 3 minutes per operation, for this purpose. The stones would weigh between 300 and 900 pounds.

c. Since July 9, 2015, Respondent has continued to move stones at its workplace using the Toyota forklift with a telescopic boom and lifter without obtaining the written approval from the forklift manufacturer.

d. The HIOSH inspector observed that the forklift's capacity and operation plate or decal was not changed to account for the use of the telescopic boom and lifter.



e. The HIOSH inspector was of the opinion that the practice of using a Toyota forklift with a telescopic boom and lifter to carry stones affected the capacity and safe operation of the forklift. He was of the opinion that the practice could result in tip-over accidents and falling loads.

f. Respondent did not provide to HIOSH any written approval for use of the telescopic boom and lifter from the forklift manufacturer.

10. On December 5, 2017, HIOSH issued a second Notification of Failure to Abate Alleged Violations (“Second FTA Citation”) alleging in citation 1, item 1, a repeat-serious FTA violation of 29 CFR 1910.178(a)(4) [section 12-60-50(a), HAR]. See, Exh. C-6.

11. Respondent stipulates a violation was committed and does not contest the validity of citation 1, item 1 of the Second FTA Citation, the repeat-serious FTA violation of 29 CFR 1910.178(a)(4) [section 12-60-50(a), HAR].

12. Citation 1, item 1 of the Second FTA Citation, citing the repeat-serious FTA violation of 29 CFR 1910.178(a)(4) [section 12-60-50(a), HAR], proposes a penalty of \$92,400.00. See, Exh. C-6.

13. The proposed penalty of \$92,400.00 was calculated according to HIOSH’s standard policies and procedures. The penalty was determined by initially determining the severity of the most serious potential injury and the probability of an injury occurring from the cited hazardous condition or practice. The combination of these factors resulted in a gravity-based penalty. The gravity-based penalty can be reduced by certain mitigating factors, i.e., the size of the Respondent, “good faith,” and

its prior citation history. For failure-to-abate violations the gravity-based penalty is multiplied by the number of days of the continuing violation, up to 30 days.

14. For citation 1, item 1 of the Second FTA Citation, a severity level of “high” was given due to the most serious potential injury that could be sustained if the forklift tipped over, e.g., broken bones requiring hospitalization and/or resulting in permanent disability. A probability of “lesser” was given because the investigator judged the likelihood of an accident to be relatively low due to the following findings: 1) only one person operated the forklift, and 2) it was operated only twice a week for approximately 2 to 3 minutes per operation. The combination of ‘high’ severity and ‘low’ probability factors result in a gravity-based penalty of \$5,000.00. However, in this instance the gravity-based penalty was increased to the maximum of \$7,700.00<sup>1</sup> because HIOSH determined that: 1) the unabated hazardous condition existed from January 2015 to the present, a period of over 3 years, 2) Respondent had been cited twice previously (Citation of April 1, 2015 and FTA Citation of August 3, 2015) for the unabated hazardous condition/practice, and 3) there is continued employee exposure to the hazardous condition and practice. The gravity-based penalty of \$7,700.00 was reduced by a maximum of 60% based upon the size of Respondent’s work force (7 employees). This resulted in an adjusted penalty of \$3,080.00 ( $\$7,700.00 \times .4$ ). The adjusted penalty was multiplied by a maximum of 30 days to result in a propose penalty of \$92,400.00 ( $\$3,080.00 \times 30$  days).

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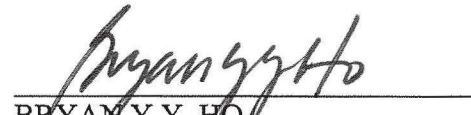
<sup>1</sup> The Field Operations Manual of HIOSH previously denoted a maximum of \$7,000.00, however this was increased (multiplied) by a factor of 1.1 in 2016, resulting in a new maximum gravity-based penalty of \$7,700.00 ( $\$7,000.00 \times 1.1$ ).

15. Respondent stipulates the formula used to calculate the fine was in accordance with the applicable law/guidelines.

DATED: Honolulu, Hawaii, May 10, 2018.

  
HERBERT B.K. LAU

Attorney for Complainant  
DIRECTOR OF DEPARTMENT  
OF LABOR AND INDUSTRIAL  
RELATIONS

  
BRYAN Y.Y. HO

Attorney for Respondent PIONEER  
MARBLE & GRANITE  
CORPORATION


SO ORDERED BY THE  
HAWAII LABOR RELATIONS BOARD:

ORDER NO. 987

DATED: May 11, 2018

  
MARCUS R. OSHIRO, Chairperson

  
SESNITA A.D. MOEPONO, Member

  
N. MUSTO, Member

