

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
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5 CHIEF ADMINISTRATIVE OFFICER  
6 OF THE OCCUPATIONAL SAFETY AND  
7 HEALTH ADMINISTRATION, DIVISION  
8 OF INDUSTRIAL RELATIONS OF THE  
9 DEPARTMENT OF BUSINESS AND  
10 INDUSTRY,

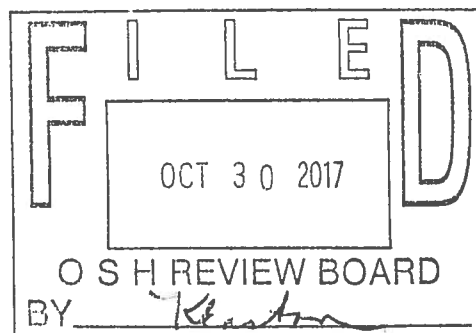
Docket No. LV 17-1905

Complainant,

vs.

11 THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.



13  
14 DECISION

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 13<sup>th</sup> day of September  
17 2017, in furtherance of notice duly provided according to law, MS. SALLI  
18 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**  
19 **Administrative Officer of the Occupational Safety and Health**  
20 **Administration, Division of Industrial Relations (OSHA);** and MS.  
21 BERNADETTE RIGO, ESQ., appearing on behalf of Respondent, **The Original**  
22 **Roofing Company, LLC,** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**  
23 **BOARD** finds as follows:

24 Jurisdiction in this matter has been conferred in accordance with  
25 Chapter 618 of the Nevada Revised Statutes.

26 The complaint filed by the OSHA sets forth allegations of violation  
27 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
28 thereto.

1 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b) (13)  
2 which provides:

3 29 CFR 1926.501(b) (13): "Residential construction." Each  
4 employee engaged in residential construction activities 6  
5 feet (1.8 m) or more above lower levels shall be protected by  
6 guardrail systems, safety net system, or personal fall arrest  
7 system unless another provision in paragraph (b) of this  
8 section provides for an alternative fall protection measure.  
9 Exception: When the employer can demonstrate that it is  
10 infeasible or creates a greater hazard to use these systems,  
11 the employer shall develop and implement a fall protection  
12 plan which meets the requirements of paragraph (k) of  
13 1926.502.

14 Note: There is a presumption that it is feasible and will not  
15 create a greater hazard to implement at least one of the  
16 above-listed fall protection systems. Accordingly, the  
17 employer had the burden of establishing that it is  
18 appropriate to implement a fall protection plan which  
19 complies with 1926.502(k) for a particular workplace  
20 situation, in lieu of implementing any of those systems.

21 NVOSHA alleged that on March 9, 2017 at a residential jobsite  
22 located at 5436 Cove Point in Las Vegas, Nevada, four (4) Original  
23 Roofing Company employees were observed performing roofing activities  
24 at heights greater than 6 feet and were not secured to anchor points.  
25 While engaged in the roofing work, employees were exposed to fall hazard  
26 height of approximately 8 feet from the eave of the roof to the ground  
27 below. Employees were exposed to potential serious injuries, including  
28 broken bones and up to death, in the event of a fall.

29 The violation was classified as "Repeat-Serious." The proposed  
30 penalty for the alleged violation is in the amount of EIGHT THOUSAND  
31 EIGHT HUNDRED DOLLARS (\$8,800.00).

32 Complainant and respondent stipulated to the admission of  
33 documentary evidence at complainant Exhibits 1 through 4, pages 1-108;  
34 and respondent exhibits identified as Tabs 1, 2 and 4, with Tab 3  
35 admitted during the course of the evidentiary hearing.

36 Complainant presented testimony and documentary evidence with

1 regard to the alleged violation through Mr. Jamal Sayegh, a Safety  
2 Supervisory from Nevada OSHEs. Mr. Sayegh testified that the actual  
3 (CSHO) Mr. Mark Nester who inspected the site was no longer affiliated  
4 with NVOSHEs. Mr. Sayegh testified as to the findings and citation  
5 issued to the respondent employer as well as the inspection reports,  
6 exhibits and documentary evidence admitted in the record by stipulation.

7 Mr. Sayegh referenced Exhibit 1, and identified pages 12 through  
8 14 as the written reported narrative from CSHO Nester. He referenced  
9 and confirmed the report provided that on or about March 9, 2017 CSHO  
10 Nester, while driving to the subject site based upon a referral report,  
11 observed four employees working on the east side of the roof structure  
12 at approximately 10:15 a.m. He obtained photographs of the employees  
13 working from the roof without any means of tie-off to anchor points,  
14 observed or any other means of fall protection. After entering the  
15 location of where the employees were working, he spoke with Mr. Ramiro  
16 Mendez who identified himself as the Foreman. The company Safety  
17 Manager arrived at the jobsite at approximately 11:00 a.m. and CSHO  
18 Nester conducted the opening conference. They interviewed Foreman  
19 Ramiro Mendez who advised he and his crew were working on the east side  
20 of the home property and reported

21 ". . . Me and three others were working from the  
22 work without tying off. The roof is about 20 feet  
23 high where we were working. The work is to replace  
24 a leak on the east side of the house. Before you  
25 arrived (OSHA) we didn't have any anchor points or  
guardrails. From 0800-1100 we were working and not  
tied off. After you showed up, Melvin went up and  
installed three anchor points."

26 Mr. Sayegh further referenced the written statement provided by Mr.  
27 Mendez which provided the substantially same information and noted  
28 particularly at Exhibit 1, pages 17 and 18, Mr. Mendez wrote

1           ". . . we worked on the roof for about an hour  
2           without tying off . . . it's my fault - was only  
3           supposed to take a couple hours . . . we climbed  
4           the ladder to get to the roof . . . me and three  
5           others were working from the work without tying  
6           off. . . ."

7           Mr. Mendez further confirmed at Exhibit 1, page 18 of the witness  
8           statement that

9           ". . . if I fell from the roof I could maybe die .  
10          . . . I checked my equipment before use . . . checked  
11          my guys equipment too . . . as Foreman I tell these  
12          guys what to do, if I saw guys without gear I would  
13          tell them to put it on. . . . It was only supposed  
14          to be a quick job which is why we didn't tie off .  
15          . . ."

16          Mr. Sayegh identified photographic exhibits at Exhibit 1, pages 49  
17          through 58A. He testified the photographs depicted two employees  
18          working without any personal protective equipment (PPE); and that two  
19          were wearing harnesses but with no tie-off. He testified photographic  
20          Exhibit 1, page 50 depicted the Foreman, Mr. Mendez. Mr. Sayegh further  
21          testified that Mr. Mendez was also identified by and confirmed by the  
22          safety supervisor to be the **competent person** on the jobsite. The  
23          picture depicted Mr. Mendez without tie-off protection in the presence  
24          of two employees who were not tied off and one other employee who was  
25          wearing no harness nor tied off whatsoever.

26          Mr. Sayegh continued his testimony on the photographic exhibits  
27          noting particularly 54A and 54B which depicted the tape measure of the  
28          distance of the fall to be greater than 6 feet and in fact approximately  
29          8 feet from the eave of the roof to the ground below.

30          Mr. Sayegh referenced additional reportings of CSHO Nester and the  
31          witness statement of Mr. Mendez at Exhibit 1, page 17 and 18 reflecting  
32          where Mr. Mendez explained ". . . it was a small job, of short duration,  
33          and no tie-off was effectuated. . . ."

1 Mr. Sayegh testified as to the "Serious" classification based upon  
2 the height of a potential fall and the probability and likelihood of  
3 serious injuries or even death to occur. Mr. Sayegh testified the  
4 citation was classified as a "Repeat" based on a previous fall  
5 protection citation within five years for same standard. He identified  
6 Exhibit 2, pages 59 through 77 to support the determination for the  
7 **Repeat** classification. Mr. Sayegh testified the previous violation was  
8 based upon a settlement agreement and final order on June 13, 2013.

9 On continued testimony referencing Exhibit 1, page 19 and the  
10 photographs at page 55, Mr. Sayegh explained the factors of **severity,**  
11 **probability and gravity** as calculated to support the proposed penalty  
12 assessment.

13 Mr. Sayegh testified on Exhibit 2, pages 82, 85 and 86 regarding  
14 the previous "write-up" of employee Foreman Mendez for his role in the  
15 violative conduct. He referenced the English version at page 88 with  
16 regard to the documents based upon Mr. Mendez being a Spanish speaking  
17 individual. Mr. Sayegh testified that OSHA was not concerned with the  
18 previous violation not being for the exact same provision under the  
19 cited standard, because it involved fall protection.

20 Counsel raised questions as to the affirmative defenses that might  
21 be available and noted CSHO Nester's reportings at page 24, paragraph  
22 7. Mr. Sayegh explained it was not a necessary finding for the  
23 enforcement officer, but he considered various factors in his reportings  
24 for final consideration by the supervisory personnel to determine  
25 whether there were other conditions that might be considered before  
26 finalizing the citation.

27 On cross-examination CSHO Sayegh testified that Exhibit 1, page 8  
28 referenced CSHO Nester's reporting of comments that Mr. Mendez had been

1 "written up several times. . . ." He explained it applied to Mr. Mendez  
2 responses to questions reflecting there was no evidence of "several"  
3 write ups. He further testified CSHO Nester obtained no confirmed  
4 information of Mr. Mendez previous write-ups for violations of fall  
5 protection standards. He testified that the terms of Exhibit 1 at page  
6 24, paragraph 7(iv) that CSHO Nester recorded a comment in the report  
7 from Safety Manager Kelly who advised "We've wrote this foreman up  
8 several times, but can't fire him and we need workers."

9 On continued cross-examination Mr. Sayegh testified with reference  
10 to Exhibit 1, page 22, paragraph 23, on the elements of **employer**  
11 **knowledge**, was based upon Mr. Mendez' status as a **Foreman** and **competent**  
12 **person** to show both actual and constructive employer knowledge. Mr.  
13 Mendez identified himself as a Foreman and competent person, and found  
14 to be the jobsite supervisory employee. He reported to CSHO Nester that  
15 he and his crew worked on the roof for about an hour without tying off.  
16 Mr. Sayegh referenced additional provisions in the Exhibit 1 report at  
17 paragraph 23 to support the determination of the required **employer**  
18 **knowledge** proof element to find violative conditions.

19 Mr. Sayegh testified that Exhibit 1, page 24, number 7, CSHO Nester  
20 noted the employer had an established safety policy on fall protection  
21 and (Mr. Nester) considered various defensive issues in his report  
22 before recommending the issuance of a citation for violation. Mr.  
23 Sayegh further testified the Exhibit 1 report showed the employer did  
24 not provide written documentation of Mr. Mendez previous disciplinary  
25 records, despite request; so he (CSHO Nester) did not have information  
26 from those records to confirm previous write-ups of Mr. Mendez. He  
27 testified that Mr. Mendez supervisory authority at the time was based  
28 upon his statements and the documentary evidence and exhibits which

1 confirmed his role to direct the work and assure safety compliance. He  
2 identified Exhibit 1, pages 17 and 18 and paraphrased Mr. Mendez  
3 statement to provide ". . . I tell guys what to do work, also if I saw  
4 a guy without PPE I tell him what to do . . ." Counsel questioned  
5 whether Mr. Mendez authority was limited to that and Mr. Sayegh  
6 testified in the affirmative.

7 On rebuttal counsel questioned Mr. Sayegh on whether a Foreman  
8 participating in violative conduct while enforcing safety of other  
9 employees for PPE is considered more egregious by OSHES. Mr. Sayegh  
10 testified affirmatively.

11 On re-cross examination Mr. Sayegh testified in response to a  
12 question as to what is needed to find constructive employee knowledge.  
13 He testified that if an employer sends employees to do roof work, it  
14 needs to assure safety compliance through PPE to perform the required  
15 work; and supports a determination for constructive notice for  
16 constructive knowledge.

17 At the conclusion of complainant's case, respondent presented  
18 testimonial evidence from three witnesses, including General  
19 Superintendent Glenn Stewart, Mr. Ramiro Mendez Cabrera, aka Mr. Ramiro  
20 Mendez, and respondent Safety Manager Mr. Matt Engleson.

21 Mr. Stewart identified documentary evidence from respondent's  
22 exhibit Tab 1, including specifically pages 1 through 19. He identified  
23 the training documentation and described the "hands on" safety training  
24 in place at the time of the citation on March 9, 2017. He identified  
25 pages 9 and 10, paragraphs 7 and 8, to support the "communication and  
26 enforcement of the safety policy to employees . . ." Mr. Stewart  
27 testified at Tab 4, page 117, on the safety discipline procedures in  
28 place at the time of the inspection. He testified as to "random field

1 audits" in place under the company safety plan to support discovery of  
2 employees in violation of the policies. The safety plan was furnished  
3 to employees in both Spanish and English. He described the company  
4 bonus policy which is tied to safety compliance at page 45 and explained  
5 the application of same to encourage employees to cooperate with the  
6 company safety plan and OSHA standards. He described the training as  
7 to the safety harness and fall protection in general and identified the  
8 "new hire" forms for employees to sign.

9 On cross-examination Mr. Stewart testified there were no citations  
10 for improper training nor the existent safety plan of the company. He  
11 described the number of job sites of the company to be approximately  
12 100; and that 13 Safety Managers have direct responsibilities for  
13 enforcing the company safety plan on the work projects. He referenced  
14 at Tab 1, page 2, paragraph 2.2 as the definition of a "**competent**  
15 **person**". He read the description and explained the meaning of that  
16 title. Mr. Stewart also explained the definition of **supervisors** based  
17 upon the company documentation. He testified the company does classify  
18 "supervisors" and "competent persons" differently. He explained that  
19 if either have more or less write ups than others it would subject the  
20 supervisor or competent person employees to more intense review. ". . .  
21 if you get written up we look at you more closely . . ."

22 Mr. Mendez testified, with the assistance of an interpreter; and  
23 explained he was a crew leader and roofer, trained by the company both  
24 directly, hands on, and through videos. He was familiar with the  
25 company harness PPE training. He worked for the company at the time of  
26 the incident, but left employment then returned in 2015. He identified  
27 Exhibit 1, page 39 as the attendance sheet for September 22, 2015  
28 showing his name and signature. He explained the training procedures,



1 his attendance at instructional classes, the videos and the physical  
2 "hands on" instructions for equipping himself with the harness to  
3 demonstrate his knowledge and capability for use. He identified Exhibit  
4 1, page 54, as the respondent training records; and confirmed his  
5 understanding of the company safety plan. He testified on the citation  
6 for violation at the subject site on March 9, 2017. "I knew I was  
7 supposed to be tied off." In response to a question of whether he had  
8 authority to hire or fire employees he testified that he had no  
9 authority to fire, transfer, suspend, layoff or promote any employee of  
10 the company at the time of the subject inspection and issuance of the  
11 citation. He further testified he could not assign, recommend or adjust  
12 grievances of employees and that "I was just there to be sure things  
13 were safe and to do a good job . . ." He testified he was aware of the  
14 employer's "jobsite audits;" and explained they were done by management  
15 to come by and check on compliance with safety requirements.

16 On cross-examination Mr. Mendez testified he was "written up" for  
17 this violation and that it was not the first time. He further responded  
18 to a question that if someone looked at the disciplinary report alone,  
19 would it appear like it was his first violation. Mr. Mendez testified  
20 "yes." Mr. Mendez further confirmed his witness statement at Exhibit  
21 1, and admitted he was not tied off when the CSHO arrived at the  
22 inspection site subject of the citation. He testified in response to  
23 a question as to whether there were no anchor points that ". . . there  
24 were some, but not enough . . . the problem there were four guys and  
25 only two anchor points. . . ." He denied that he did not tie off because  
26 of being pressed for time. He admitted he was involved in multiple  
27 write ups but explained ". . . some times others on the crew do  
28 something that's not correct so I'm held responsible . . ."

1 Mr. Matthew Engleson identified himself as the Safety Manager of  
2 the respondent employer. He described the company safety plan and fall  
3 protection program, instructional presentations, classes, the videos and  
4 the materials utilized to support the plan. He identified exhibit Tab  
5 1, pages 19 to 36 as a company "Power Point" presentation. He testified  
6 it provided extensive training and details for setting anchor points,  
7 harness work, load capacities, PPE; and continued testimony with regard  
8 to Tab 2, pages 39 to 65. He testified the documents showed three other  
9 employees went through retraining and included the sign-in sheets for  
10 employees subject of violations and who required company retraining.

11 Mr. Engleson described the company "site audits" for spot checking  
12 crews; and also the "mock OSHA inspections" so employees would  
13 understand and be accustomed to working with CSHOs who appeared at the  
14 jobsite. He identified respondent's Tab 3 to show evidence of the job  
15 audits performed for other crews. He testified Tab 3 demonstrates the  
16 audits show this same crew photographed after a random audit was  
17 conducted where they were observed in full compliance through the  
18 photographic exhibits. He referenced page 80 showing Foreman Mendez  
19 depicted there. Mr. Engleson testified the employees involved in the  
20 subject violation went through even more intensive retraining, and were  
21 informed it would be their last time as employees of the company if  
22 these incidents occurred again.

23 On cross-examination Mr. Engleson testified this crew has always  
24 followed the rules. He further testified Mr. Mendez did not tell others  
25 to not tie off, but rather those individuals were not tied off because  
26 they were about to leave the job site as demonstrated by the fact that  
27 two of them had their harnesses on. He testified they had another job,  
28 so needed to leave, and that's why the subject incident of violation

1 occurred. Mr. Engleson testified Mr. Mendez was within the scope of his  
2 authority to make sure employees were tied off. He described the  
3 progressive disciplinary policy of the company commencing at page 26.  
4 In response to further questions, he testified that page 37 shows that  
5 all the employees subject to this violation left the company after the  
6 citation, but came back later.

7 On closing argument, complainant counsel asserted that the burden  
8 of proof had been established by the evidence in the record and clearly  
9 the admissions of Mr. Mendez. There was no dispute nor evidence that  
10 the employees photographed and observed on the roof by CSHO Nester were  
11 **not tied off** in furtherance of the requirement of the standard.  
12 **Exposure** to the described hazards and the **violative conduct** were  
13 established by that evidence alone. Mr. Mendez admitted he was a  
14 **Foreman and a crew leader** while his testimony reflected he had the  
15 **responsibility** for assuring safety at the worksite and assurance  
16 employees would complete the work tasks. Counsel asserted the standard  
17 was **applicable** by the undisputed work that was underway. As to the  
18 element of **employer knowledge**, counsel argued that Mr. Mendez had  
19 **sufficient authority**, regardless of specific definition at the worksite  
20 to **oversee the work and conduct of the employees**. Mr. Mendez testified  
21 he had been written up before. CSHO Nester confirmed Mr. Mendez  
22 statement that this was not the first violation.

23 Counsel argued the **employee misconduct defense** must fail because  
24 **all four elements were not proven**, focusing particularly on the lack of  
25 a **meaningful enforcement** of the rules. Mr. Mendez was known to be a  
26 violating Foreman previously, yet again placed in charge of employees  
27 at this company's worksite where he again repeated his previous  
28 violative conduct of failing to assure the crew tie off protection as

1 well as his own.

2 Counsel identified the elements to establish a prima facie case of  
3 violation and argued all were met under the burden of proof by  
4 preponderant evidence. Counsel **further asserted the defense of employee**  
5 **misconduct must fail** based upon the facts in evidence.

6 Respondent presented closing argument. Counsel asserted the  
7 company ". . . did everything it could under its safety plan and  
8 particularly retraining procedures for any employees who were subject  
9 of violations. . . ." The extensive safety plan, including unannounced  
10 job audits and mock worksite training requirements, particularly for the  
11 crew employees involved in the subject incident, support compliance with  
12 the requirements for the defense of employee misconduct. Counsel also  
13 asserted there was no evidence in the record Mr. Mendez violated  
14 specific company policy.

15 Counsel argued the burden of proof was not met to establish the  
16 violation as there was **no evidence to support any basis for employer**  
17 **knowledge, actual or constructive**. She argued there was no evidence  
18 offered or admitted of "actual" employer knowledge. The only knowledge  
19 that could be applied here must be by imputation but requires Mr. Mendez  
20 be a ". . . **supervisor under the recognized meaning of that definition.**  
21 . . ." However the evidence shows Mr. Mendez **did not have the authority**  
22 **of a supervisor** to ". . . hire, fire, review or discipline any  
23 employees. . . ." Accordingly ". . . his knowledge cannot be imputed  
24 to the employer under the Nevada Supreme Court decision in the *Terra*  
25 *Construction* case." There a foreman was working in a trench and in  
26 violation of the OSHA standards, but it could not be imputed to the  
27 employer. The same conditions apply here as there was no prima facie  
28 case of violation because Mr. Mendez was ". . . just a Foreman crew

1 leader therefore that status and knowledge cannot be legally imputed to  
2 the employer to establish employer knowledge."

3 Counsel further argued that even **if** a prima facie case of violation  
4 was established then the **defense of employee misconduct** should be relied  
5 upon because all the proof elements for that defense were established.  
6 Counsel referenced the four required elements and noted each in evidence  
7 as subject of sworn testimony and extensive documentation. Counsel  
8 argued the company had spent a great deal of money to "beef up . . . all  
9 training and retraining elements" which fully supports the defense  
10 element for employee misconduct. She also argued all the elements of  
11 the defense were established and the discipline records show actual  
12 enforcement through the retraining procedures. She concluded this was  
13 a pure case of an **isolated incident of willful disregard by an employee**.  
14 There is no evidence of Mr. Mendez previous violations, other than brief  
15 comments there were violations; but he (Mr. Mendez) explained in his  
16 testimony that what others did on the worksite as being attributed to  
17 him. Counsel concluded arguing there was no prima facie case of  
18 violation because no **employer knowledge**, and asserted that if it could  
19 be found by the Board then the affirmative defense of employee  
20 misconduct should be accepted based upon the proof by evidence of the  
21 four elements required under the applicable case law.

22 The Board is required to review the evidence and recognized legal  
23 elements to prove violations under established occupational safety and  
24 health law.

25 In all proceedings commenced by the filing of a  
26 notice of contest, the **burden of proof** rests with  
the Administrator. (See NAC 618.788(1)).

27 NAC 618.788 (NRS 618.295) In all proceedings  
28 commenced by the filing of a notice of contest, the  
burden of proof rests with the Chief.

1 All facts forming the basis of a complaint must be  
2 proved by a **preponderance of the evidence**. See  
3 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD  
4 ¶16,958 (1973).

5 NRS 233B(2) "**Preponderance of evidence**" means  
6 evidence that enables a trier of fact to determine  
7 that the existence of the contested fact is more  
8 probable than the nonexistence of the contested  
9 fact.

10 To prove a violation of a standard, the Secretary  
11 must establish (1) the applicability of the  
12 standard, (2) the existence of noncomplying  
13 conditions, (3) employee exposure or access, and  
14 (4) that the **employer knew or with the exercise of  
15 reasonable diligence could have known of the  
16 violative condition**. See *Belger Cartage Service,  
17 Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
18 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
19 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC  
20 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
21 (No. 76-1408, 1979); *American Wrecking Corp. v.  
22 Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.  
23 2003). (emphasis added)

24 A respondent may rebut allegations by showing:

- 25 1. The standard was inapplicable to the situation  
26 at issue;
- 27 2. The situation was in compliance; or lack of  
28 access to a hazard. See, *Anning-Johnson Co.*,  
4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).  
(emphasis added)

NRS 618.625 provides in pertinent part:

10 ". . . a **serious** violation exists in a place of  
11 employment if there is a substantial probability  
12 that death or serious physical harm could result  
13 from a condition which exists, or from one or more  
14 practices, means, methods, operations or processes  
15 which have been adopted or are in use in that place  
16 of employment **unless the employer did not and could  
17 not, with the exercise of reasonable diligence,  
18 know of the presence of the violation.**" (emphasis  
19 added)

NRS 618.635 provides in pertinent part:

20 Any employer who willfully or repeatedly violates  
21 any requirements of this chapter, any standard,  
22 rule, regulation or order promulgated or prescribed  
23 pursuant to this chapter, may be assessed an

1 administrative fine of not more than \$70,000 for  
2 each violation, but not less than \$5,000 for each  
willful violation. (emphasis added)

3 A "repeat" violation is established if based upon a prior violation  
4 of the same standard, a different standard, or general duty clause, if  
5 the present and prior violation is **substantially** similar.

6 A violation is considered a repeat violation:

7 If, at the time of the alleged repeat violation,  
8 there was a Commission final order against the  
9 employer for a substantially similar violation.  
10 *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,  
11 1979). A prima facie case of substantial  
12 similarity is established by a showing that the  
13 prior and present violations were for failure to  
14 comply with the same standard. *Superior Electric  
15 Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,  
1996). *Robert B. Reich, Secretary of Labor, United  
16 States Department of Labor v. D.M. Sabia Company  
17 and Occupational Safety and Health Review  
18 Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.  
19 Alexis M. Herman, Secretary of Labor, and  
20 Occupational Safety and Health Administration,  
21 Respondents and United Auto Workers, Local 974,  
22 Intervenors*, 154 F.3d 400 (1998).

23 A repeated violation may be found based on a **prior  
24 violation of the same standard, a different  
25 standard, or the general duty clause, but the  
26 present and prior violations must be substantially  
27 similar.** *Caterpillar, Inc.*, 18 OSH Cases 1005,  
28 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18  
OSH Cases 1481 (7<sup>th</sup> Cir. 1998); *GEM Indus., Inc.*, 17  
OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may  
generally establish its prima facie case of  
substantial similarity by showing that the prior  
and present violations are of the same standard.  
The employer may rebut that showing by establishing  
that the violations were substantially different.  
Where the citations involve different standards,  
OSHA must present "sufficient evidence" to  
establish the substantial similarity of the  
violations. A similar showing must be made if the  
citations involve the same standard but the  
standard is broadly worded. Repeated violations  
are not limited to factually identical occurrences.  
Provided that the hazards are similar, minor  
differences in the way machines work or in the size  
and shape of excavations will usually not lead to  
a finding of dissimilarity. In general, the key  
factor is whether the two violations resulted in

1 substantially similar hazards. It is not necessary,  
2 however, that the seriousness of the hazard  
3 involved in the two violations be the same.  
Rabinowitz, Occupational Safety and Health Law, 2<sup>nd</sup>  
Ed. 2008 at pp. 230-231. (emphasis added)

4 The Board finds the proof elements required for a finding of  
5 violation were met by the preponderant evidence as to **applicability,**  
6 **noncompliant conditions, exposure** as demonstrated by the **photographs** in  
7 evidence and corroborated by the uncontroverted written employee  
8 admissions through Mr. Mendez. The proof element of "**employer**  
9 **knowledge**", while debated under an interpretation of the Nevada Supreme  
10 Court case law and the definition of a "supervisory employee," was  
11 established by the preponderant evidence. The principle of employer  
12 knowledge by imputation for **constructive** application to the employer was  
13 supported by the evidence. The case turned on the issue of employer  
14 knowledge based on reasonable **foreseeability** of supervisory employee  
15 Mendez **personal violation** of the PPE cited standard **and failure to**  
16 **enforce the safety standard for the employees** under his supervision.  
17 Once proven, the issue then is whether the evidence supports the  
18 recognized defense of **unpreventable employee misconduct.**

19 **Employer knowledge** is a critical proof element under occupational  
20 safety and health law. It must be proved through preponderant evidence  
21 to have occurred either directly or constructively.

22 Actual knowledge is not required for a finding of  
23 a serious violation. Foreseeability and  
24 preventability render a violation serious provided  
25 that a reasonably prudent employer, i.e., one who  
26 is safety conscious and possesses the technical  
27 expertise normally expected in the industry  
28 concerned, would know the danger. *Chandler-Rusche,*  
*Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723 (1976),  
*appeal filed*, No. 76-1645 (D.C. Cir. July 16,  
1976); *Rockwell International*, 2 OSHC 1710, 1973-  
1974 OSHD ¶ 16,960 (1973), *aff'd*, 540 F.2d 1283 (6<sup>th</sup>  
Cir. 1976; *Mountain States Telephone & Telegraph*  
*Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15-365 (1973).



1 No actual employer knowledge was subject of evidence, therefore the  
2 Board must look to the recognized principles to support the required  
3 element constructively by imputation to the employer. Generally,  
4 violative employee conduct can be imputed to the employer, including  
5 that of a supervisory employee charged with the responsibility of  
6 enforcing company and OSHA safety standards. The theory is that a  
7 responsible employer who does not **actually know** of violative employee  
8 conduct should, through **the exercise of due diligence, be aware,** and  
9 **therefore knowledgeable** that employees are not complying with company  
10 safety policies and/or OSHA standards. Similarly, if a **supervisory**  
11 **employee is involved in self-misconduct or failures to enforce safety**  
12 **compliance,** that too can be subject of imputation under established  
13 Review Commission, Federal District Court, and Nevada law. *Division of*  
14 *Occupational Safety and Health vs. Pabco Gypsum*, 105 Nev. 371, 775 P.2d  
15 701 (1989). *Terra Contracting, Inc. vs. Chief Administrative Officer of*  
16 *the Occupational Safety and Health Administration, et al., citing*  
17 *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11 Cir.  
18 2013). The Nevada Supreme Court in *Terra, supra* established the legal  
19 guidance for analysis of evidence on supervisory employee misconduct,  
20 for lawful imputation to the employer.

21 Here the supervisory employee Foreman, crew leader and competent  
22 person Mr. Mendez, was observed, photographed and admitted neither he  
23 nor any of the employees in his crew whom he was supervising were "tied  
24 off." To impute **knowledge** of the supervisory employee violative conduct  
25 to the employer as proof of the element of "**employer knowledge**" requires  
26 preponderant evidence. Accordingly, the evidence must establish the  
27 employer should have **foreseen** and therefore constructively **known** Foreman  
28 Mendez was a questionable individual with whom to invest confidence to

1 support safety policy and perform the job tasks assigned, which included  
2 assuring **he and all the employees he supervised** complied with the  
3 company safety rules, training and OSHA standards.

4 Mr. Mendez was rehired as a foreman by the company after admitted  
5 similar previous violative self conduct. After employer sponsored  
6 retraining, he was again assigned to supervise employees conducting work  
7 requiring PPE - fall protection. The employer had sufficient knowledge  
8 to foresee that Mr. Mendez was an individual who should have been  
9 watched more closely, and likely not reasonably considered to be placed  
10 in charge of a crew performing work requiring tie-off fall protection  
11 without additional supervision or a systemology for checks and balances  
12 to be sure he was compliant. The employer also had sufficient knowledge  
13 to support "foreseeability" that Mr. Mendez might have been considered  
14 for general non-supervisory Foreman or competent person work tasks but  
15 under the supervision of a more reliable supervisory Foreman, competent  
16 person or crew leader.

17 In applying the facts in evidence to the rationale set forth by the  
18 Nevada Supreme Court in *Terra, supra*, there was sufficient preponderant  
19 evidence of foreseeability on the part of the respondent employer that  
20 Mr. Mendez previous conduct upon which to base imputed employer  
21 knowledge of the potential for violation of the cited standard by Mr.  
22 Mendez. Complainant submitted competent preponderant evidence that the  
23 respondent employer here had previously engaged Mr. Mendez as a Foreman  
24 and crew leader to supervise it's jobs in the past where he failed to  
25 personally comply and enforce fall protection requirements.

26 The Nevada Supreme Court in *Terra* requires specific supportive  
27 preponderant evidence to establish constructive employer knowledge.

28 The Third, Fourth, Fifth, Tenth, and Eleventh

1 Circuit Courts of Appeal have concluded that, with  
2 respect to supervisor violations of federal  
3 occupational safety and health law, "**employer**  
4 **knowledge must be established, not vicariously**  
5 **through the violator's knowledge,** but by either the  
6 employer's actual knowledge, or by its constructive  
7 knowledge based on the fact that the employer  
8 could, under the circumstances of the case, foresee  
9 the unsafe conduct of the supervisor [that is, with  
10 evidence of lax safety standards]." *ComTran Grp.,*  
11 *Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316  
12 (11<sup>th</sup> Cir. 2013) (alterations in *ComTran Grp.*)  
13 (quoting *W.G. Yates & Sons Constr. Co. Inc. v.*  
14 *Occupational Safety & Health Review Comm'n*, 459  
15 F.2d 604, 609 n.8 (5<sup>th</sup> Cir. 2006)); see *Penn. Power*  
16 *& Light Co. v. Occupational Safety & Health Review*  
17 *Comm'n*, 737 F.2d 350 (3d Cir. 1984); *Mountain*  
18 *States Tel. & Tel. Co. v. Occupational Safety &*  
19 *Health Review Comm'n*, 623 F.2d 155 (10<sup>th</sup> Cir. 1980);  
20 *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396  
21 (4<sup>th</sup> Cir. 1979); see also *Century Steel*, 122 Nev. At  
22 589, 137 P.3d at 1158-59 (looking to federal  
23 decisional law in interpreting similar provisions  
24 in the NOSHA). (*Terra, supra* page 3) (emphasis  
25 added)

14 The guidance provided by the Nevada Supreme Court in *Terra* required  
15 NVOSHA to provide **evidence of foreseeability** as to violation in addition  
16 to confirmation that a supervisor misconduct should be subject of  
17 imputation. Here the past conduct of Foreman crew leader Mendez and the  
18 difficulties of the industry to enforce fall protection were known by  
19 the employer yet it sent Mr. Mendez to a jobsite without any additional  
20 supervision of his own conduct and relied on him to enforce the safety  
21 of not only himself but the employees under his direction.

22 The Board finds competent preponderant evidence of foreseeability  
23 such that the employer could or should have known its supervising  
24 Foreman, employee Mendez, may not comply or enforce OSHA standards and  
25 company safety policy.

26 There was competent evidence, based upon the employer's knowledge  
27 of the previous conduct of Foreman Mendez, that he failed to enforce  
28 fall arrest safety requirements.

1 The previous confirmed violation of fall arrest violations by the  
2 respondent in evidence supported finding of the "Repeat" classification.

3 Further the previous "write ups" of Foreman Mendez demonstrate in  
4 total preponderant evidentiary bases to support constructive imputation  
5 of employer knowledge relying upon foreseeability that this employer  
6 should have known that Foreman Mendez may not enforce tie off. *Terra*  
7 *Contracting, Inc. vs. Chief Administrative Officer of the Occupational*  
8 *Safety and Health Administration, et al., ComTran Grp., Inc. v. U.S.*  
9 *Dep't of Labor, 722 F.3d 1304, 1316 (11 Cir. 2013)*

10 Respondent raised and argued the recognized defense of  
11 **unpreventable employee misconduct.**

12 The burden of proof rests with OSHA under Nevada law (NAC  
13 618.798(1)); but after establishing same, the burden shifts to the  
14 respondent to prove any recognized defenses. See *Jensen Construction*  
15 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10  
16 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

17 To establish the affirmative defense of "unpreventable employee  
18 misconduct," the employer **must prove four elements:** (1) **established**  
19 **work rules** designated to prevent the violation, (2) **adequate**  
20 **communication of those rules** to the employees, including supervisors,  
21 **3) steps taken to discovery violations** of those rules, and (4) **effective**  
22 **enforcement of those rules after discovering violations.** *Marson Corp.*,  
23 10 BNA OSHC 1660 (No. 78-3491, 1982); see *Pabco Gypsum*, 105 Nev. at 373,  
24 775 P.2d at 703, *Terra Contracting Inc., supra.*

25 In the subject case, the unrebutted evidence and lack of any  
26 challenge as to the first element reflected an established **recognized**  
27 **safety plan** upon which the respondent could rely to assert the defense  
28 of employee misconduct. Further, the exhibits and testimony established

1 there were work rules **designed to prevent violation**. The evidence of  
2 training and references at the exhibits and testimony demonstrated  
3 **adequate communication of the rules to its employees**. The safety  
4 programs identified to discover violations and enforce the rules and  
5 particularly the retraining aspects were directly set forth and  
6 undisputed by contrary evidence from the documentation. However the  
7 respondent evidence of **effective enforcement was** not persuasive nor  
8 preponderant to meet the essential element to find **meaningful effective**  
9 **enforcement of the safety program**.

10 The respondent specifically raised the recognized defense of  
11 "unpreventable employee misconduct;" and asserted employee misbehavior  
12 and the principles of the defense through the employer safety policy and  
13 disciplinary program.

14 However, employee misbehavior, standing alone, does not relieve an  
15 employer. Where the Secretary shows the existence of violative  
16 conditions, an employer may defend by showing that the employee's  
17 behavior was a deviation from a **uniformly and effectively enforced work**  
18 **rule, of which deviation the employer had neither actual nor**  
19 **constructive knowledge**. *A. J. McNulty & Co., Inc.*, 4 OSHC 1097, 1975-  
20 1976 OSHD ¶ 20,600 (1976). (emphasis added)

21 An employer has the **affirmative duty to anticipate and protect**  
22 **against preventable hazardous conduct by employees**. *Leon Construction*  
23 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976).

24 In order to prove an unpreventable employee  
25 misconduct defense, the employer must establish  
26 that it had: established work rules designed to  
27 prevent the violation; adequately communicated  
28 those work rules to its employees (including  
supervisors); taken **reasonable steps to discover**  
**violations of those work rules**; and **effectively**  
**enforced those work rules** when they were violated.  
*New York State Electric & Gas Corporation*, 17 BNA

1 OSHC 1129, 1195 CCH OSHD ¶30,745 (91-2897, 1995).  
2 (Emphasis added)

3 Although there is a similar doctrine of **supervisory**  
4 **misconduct**, some cases characterize it not as an  
5 affirmative defense but as a rebuttal of the  
6 imputation to the employer of the supervisor's  
7 knowledge. The Commission has stated that  
8 **involvement by a supervisor in a violation is**  
9 **"strong evidence that the employer's safety program**  
10 **was lax."** "Where a supervisory employee is  
11 involved, the proof of unpreventable employee  
12 misconduct is **more rigorous and the defense is more**  
13 **difficult to establish since it is the supervisors'**  
14 **duty to protect the safety of employees under their**  
15 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases  
16 1549, 1552 (Rev. Comm'n 1982). *Consolidated*  
17 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.  
18 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases  
19 2031 (Rev. Comm'n 1994). Rabinowitz Occupational  
20 Safety and Health Law, 2008, 2<sup>nd</sup> Ed., page 157.  
21 (Emphasis added)

22 ". . . (A) **supervisor's knowledge** of deviations  
23 from standards . . . is properly **imputed to the**  
24 **respondent employer.** . . ." *Division of Occupational*  
25 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,  
26 775 P.2d 701 (1989). (emphasis added)

27 It is well settled that **knowledge, actual or**  
28 **constructive, of an employer's supervisory**  
29 **personnel will be imputed to the employer**, unless  
30 the employer establishes **substantial grounds** for  
31 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-  
32 93 CCH OSHD ¶29,254 (No. 85-531 1991). The  
33 Commission held that once there is a prima facie  
34 showing of employer knowledge through a supervisory  
35 employee, the employer can rebut that showing by  
36 establishing that the failure of the supervisory  
37 employee to follow proper procedures was  
38 **unpreventable**. In particular, the employer must  
39 establish that it had relevant work rules that it  
40 adequately communicated **and effectively enforced**.  
41 *Consolidated Freightways Corp.*, 15 BNA OSHC 1317,  
42 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).  
43 (emphasis added) *Terra Contracting, Inc.*, (*supra*)

44 Foreman Mendez himself was observed, photographed and admitted  
45 working without fall protection in violation of the cited standard.

46 "[w]here a **supervising employee is involved**, the  
47 proof of unpreventable employee misconduct is more  
48 rigorous and the defense is more difficult to

1 establish since it is the supervisor's duty to  
2 protect the safety of employees under his  
3 supervision." In *Sec'y of Labor v. Westar Energy*,  
20 BNA OSHC 1736 (OSHC Jan. 6, 2004) (emphasis  
added)

4 A further element of proof to support the defense of unpreventable  
5 employee misconduct requires preponderant evidence the respondent has  
6 **taken steps to discover violations** and **effectively enforced the rules**  
7 **when violations are discovered.** The weight of evidence from the company  
8 safety records and disciplinary practice supports a reasonable inference  
9 and finding that no meaningful discipline was imposed or reinforced.

10 The facts in evidence clearly establish that foreman Mendez had  
11 direct knowledge of the violative conduct while working along side his  
12 crew. He could readily observe the violative conduct. The entire crew  
13 was in violation of the standard at the time of the CSHO inspection,  
14 observations and photographs. The violations of the standard, by  
15 multiple employees, occurred in **plain view.**

16 The Board is concerned with the negative impacts upon any Nevada  
17 employer cited for a **repeat/serious** violation and subjected to notably  
18 substantial monetary penalties but also a negative work record. While  
19 regrettable, the facts in evidence under the governing occupational  
20 safety and health law leave no alternative. Employee safety and assured  
21 compliance must be fully enforced at Nevada worksites. The Board  
22 recognizes and compliments the efforts of the respondent employer  
23 through its substantial **retraining** program and hiring additional  
24 qualified safety consultants; however the widespread operations  
25 throughout the city and substantial number of working employees require  
26 actual **meaningful enforcement** be undertaken to assure compliance,  
27 employee safety, and the avoidance of future citations. It is  
28 understandable that an employer cannot supervise all of its employees

1 every hour of the day, however, an accelerated enforcement program  
2 **uniformly applied and meaningfully enforced** can result in substantial  
3 compliance, a safer worksite, and elimination of citations. Evidence  
4 of a uniformly applied and meaningfully enforced safety and discipline  
5 program is recognized under occupational safety and health law for an  
6 employer defense of unpreventable employee misconduct or isolated acts  
7 of employee noncompliance. Nevada occupational safety and health law  
8 does not require unreasonable enforcement practices, nor impose strict  
9 liability on employers. However there must be evidence of a qualified  
10 safety program in conjunction with a **meaningfully enforced safety/  
11 disciplinary program** to avoid the imposition of citations and more  
12 importantly the potential for serious employee injuries.

13       The controlling cases under occupational safety and health law have  
14 widely recognized the employer defense for the **unforeseeable**  
15 disobedience of an employee who violates a specific standard. Further,  
16 the Nevada Supreme Court has made it clear that the element of **employer**  
17 **knowledge** is a critical factor in OSHA construction cases. However,  
18 with preponderant evidence of foreseeability and lack of a sufficient  
19 proof element to support the defense of employee misconduct through  
20 insufficient evidence of meaningful actual enforcement, the defense  
21 cannot mitigate or eliminate the violations cited.

22       While respondent questions what more could an employer do than hire  
23 qualified people to supervise employees under an established company  
24 safety and training program, expecting supervisory personnel to enforce  
25 those policies and practices. The position of NVOSHES and confirmed by  
26 this Board is that there must be preponderant evidence for the very  
27 important element of not just the existence of an enforcement program  
28 but a **meaningfully enforced plan** by the employer. Here, while it is not



1 the ruling of this Board that every employee found in violation  
2 supervisor or otherwise be terminated, that employee could be returned  
3 to the workforce, but under the direction of qualified supervisors who  
4 **known to have a record for responsible self and employee enforcement of**  
5 **those working under his direction or supervision.** With the evidence of  
6 past violative PPE tie-off by Mr. Mendez, and the failure to provide any  
7 historical records of his previous, but admitted violative conduct in  
8 evidence, the Board cannot find support for meaningful enforcement. It  
9 is critical that a supervisory employee with a past history of ignoring  
10 the basic tie off requirements which expose employees and the supervisor  
11 himself to serious injury or death cannot be responsibly addressed. The  
12 elements required to support the employee misconduct defense are  
13 reasonable and practical. Here, while the safety plan of the respondent  
14 employer is admirable, and particularly the retraining program, there  
15 should have been additional or better qualified supervisory personnel  
16 on the jobsite with this crew rather than Mr. Mendez. The lack of a  
17 reasonable alternative requires this Board to include imputation of the  
18 knowledge for the past conduct of Mr. Mendez to the employer when a  
19 similar violation occurred. In the subject case, the facts and evidence  
20 provide the level of proof by a preponderance that the respondent  
21 employer could or should have known with the exercise of reasonable  
22 diligence that its enforcement policies would not be implemented by its  
23 supervising Foreman, crew leader, Mr. Mendez.

24 The Board concludes, based upon the evidence, as a matter of fact  
25 and law, the cited violation occurred, properly classified as a  
26 "Repeat/Serious" violation and the proposed penalty in the amount of  
27 \$8,800.00 reasonable and confirmed.

28 It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH



1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

4 CHIEF ADMINISTRATIVE OFFICER  
5 OF THE OCCUPATIONAL SAFETY AND  
6 HEALTH ADMINISTRATION, DIVISION  
7 OF INDUSTRIAL RELATIONS OF THE  
8 DEPARTMENT OF BUSINESS AND  
9 INDUSTRY,

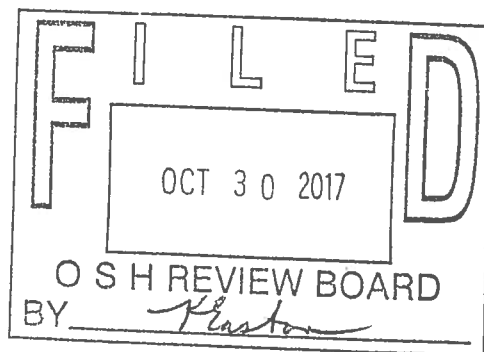
Docket No. LV 17-1905

Complainant,

vs.

10 THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.  
11  
12 \_\_\_\_\_/



13 CERTIFICATE OF MAILING

14 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of  
15 SCARPELLO & HUSS, LTD., and that on October 30, 2017 I deposited for  
16 mailing, certified mail/return receipt requested, at Carson City,  
17 Nevada, a true copy of the **DECISION** addressed to:

18 Salli Ortiz, Esq.  
19 DIR Legal  
20 400 W King St., #201  
21 Carson City NV 89703

22 Bernadette Rigo, Esq.  
23 Resnick & Louis, P.C.  
24 5940 South Rainbow Blvd.  
25 Las Vegas NV 89118

26 DATED: October 30, 2017

27 RECEIVED  
28 NOV 01 2017  
DIR LEGAL  
CARSON CITY OFFICE

29   
30 \_\_\_\_\_  
KAREN A. EASTON