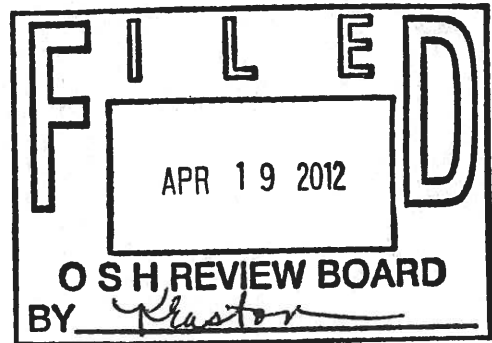


1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
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7 CHIEF ADMINISTRATIVE OFFICER
8 OF THE OCCUPATIONAL SAFETY AND
9 HEALTH ADMINISTRATION, DIVISION
10 OF INDUSTRIAL RELATIONS OF THE
11 DEPARTMENT OF BUSINESS AND
12 INDUSTRY,

Docket No. RNO 12-1528



13 Complainant,

14 vs.

15 PRS OF NEVADA, LTD., doing business
16 as PROFESSIONAL ROOFING SERVICES,

17 Respondent.
18 _____/

19 DECISION

20 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
21 **HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of March,
22 2012 in furtherance of notice duly provided according to law, MR.
23 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,
24 **Chief Administrative Officer of the Occupational Safety and Health**
25 **Administration, Division of Industrial Relations (OSHA)**; and MR. DALTON
26 HOOKS, JR., ESQ. appearing on behalf of Respondent, **PRS OF NEVADA, LTD.**
27 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

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1 thereto.

2 Citation 1, Item 1, charges a "Repeat/Serious" violation of 29 CFR
3 1926.501(b)(10). The complainant alleges the respondent employer failed
4 to comply with requirements for fall hazard protection to employees
5 engaged in roofing activities above six feet from ground level. The
6 proposed penalty for the Repeat/Serious violation is in the amount of
7 \$34,650.00.

8 Counsel for the Chief Administrative Officer presented testimony
9 and documentary evidence with regard to the alleged violation.
10 Compliance Safety and Health Officer (CSHO) Jason Tate testified he and
11 co-CSHO Kurt Garrett inspected the worksite of respondent based upon a
12 complaint filed with Nevada OSHA. The initial complaint reported
13 employees were working on the roof a two-story building without fall
14 protection, using faulty extension cords, and ladders with broken rungs
15 and feet. The CSHOs found no facts to support the complaints with the
16 exception of one employee working without required fall protection. Mr.
17 Tate identified Exhibit 1, stipulated in evidence, which included his
18 inspection report, notice of hazard, inspection narrative, worksheets,
19 and the documentation of opening/closing conferences. Mr. Tate further
20 identified Exhibit 2 as four photos taken by him during the inspection.
21 CSHO Tate testified he observed a respondent employee, later identified
22 as Raul Luevano (EE#1), working at the edge of the two story roof top
23 approximately 19 feet above ground level near the ladder access to the
24 roof. When CSHO Tate and Garrett approached the work area, they saw Mr.
25 Luevano using a tacker/stapler to attach plastic sheeting on areas of
26 the roof. CSHO Tate observed and photographed Mr. Luevano within one
27 step of the edge of the roof top (Exhibit 2). When first observed Mr.
28 Luevano was wearing a personal fall arrest harness, however as he turned

1 Mr. Tate noted he was not connected ("tied off") to his "D-ring". CSHO
2 Tate testified Mr. Luevano explained his unsecured position in the
3 photographic Exhibit 2 stating he momentarily unhooked because he was
4 preparing to climb down the ladder. He needed more material from his
5 work truck so un-hooked the "rope grab." Mr. Luevano told CSHO Tate
6 during the site interview there was only one anchor point and lanyard
7 on the roof top. Mr. Tate identified Exhibit 4, admitted in evidence
8 by stipulation, as the written statement of Mr. Luevano taken at the
9 time of the interview portion of the inspection. Mr. Tate testified he
10 wrote the statement based upon verbal responses from Mr. Luevano, read
11 the statement back to him, and obtained Mr. Luevano's signature
12 accordingly. He testified the written statement signed by Mr. Luevano
13 confirmed his harness was not attached to the D-ring when observed and
14 photographed by CSHO Tate.

15 CSHO Tate also noted employee Zenaido Provencio (EE#2) working on
16 the roof with Mr. Luevano during the inspection. He was observed
17 wearing his Personal Fall Arrest System (PFAS), including an attached
18 lanyard, in compliance with the requirements of the standard.

19 Mr. Tate calculated the roof height at approximately 19 feet by
20 measuring the bottom two rungs of the access ladder then counting the
21 number of rungs to the top of the roof where employee Luevano was
22 observed working. There was no warning line, or other non-working
23 employee acting as a *monitor* to satisfy recognized *alternate* protection
24 requirements. CSHO Tate found no other or *alternate means of protection*
25 from fall hazard for the employees.

26 Mr. Tate testified he observed Mr. Luevano engaged in work for
27 approximately two minutes and then obtained the photographs in evidence.
28 Mr. Tate additionally testified that despite Mr. Luevano informing him

1 he was not tied to the D-ring because he had just unhooked to climb down
2 the ladder he (Tate) did not find the statement credible because he
3 personally observed Mr. Luevano engaged in work rather than moving
4 toward or down the ladder itself.

5 CSHO Tate further testified as to the potential for serious injury
6 or death from a fall at a height beyond 19 feet. He also identified
7 Exhibit 3, stipulated in evidence, as the two previous citations upon
8 which the **repeat** classification was based.

9 On cross-examination by respondent counsel, Mr. Tate testified he
10 did not climb to the roof to observe tools being used or other working
11 conditions for personal safety reasons, but relied upon his observations
12 from the ground level and the photos depicting the violative conditions.
13 Mr. Tate further testified he reviewed all training and safety
14 documentation provided by the respondent and found same to be compliant
15 with applicable standards.

16 Complainant presented testimony from Mr. Raul Luevano who
17 identified himself as a foreman employed by respondent on the subject
18 job site, and the employee depicted in the photographic exhibits. He
19 testified that, according to OSHA regulations, an employee cannot act
20 as a safety monitor if he is engaged in other work. He testified that
21 Mr. Provencio was handing him materials while tied off and working on
22 the adjacent section of the roof.

23 Respondent conducted cross-examination of Mr. Luevano. He
24 testified he was using a hammer and nail and not a staple tacking tool
25 which contradicted the testimony of CSHO Tate. He identified and
26 testified as to respondent's Exhibit A, stipulated in evidence, an
27 aerial photo of the worksite. He testified he was tied off during the
28 entire time of actually working on the roof. Mr. Provencio was not

1 installing plastic but only handing him materials and part of his job
2 was to observe Mr. Luevano's work as a *safety monitor*. He testified
3 there was another employee foreman assigned to the job site (Mr. Daryl
4 Barnes) but he left prior to actually commencing work due to the
5 cold/wet conditions. Mr. Barnes was designated to be the safety monitor
6 initially but Mr. Provencio assumed that job after his departure. Mr.
7 Luevano testified he was not installing any materials around or near the
8 ladder when OSHA arrived but rather preparing to descend the roof from
9 the ladder to obtain more material.

10 Complainant presented additional testimony and evidence from Mr.
11 Sean Heenan who identified himself as an OSHA supervisor. He confirmed
12 respondent repeat violations of the fall protection standard in support
13 of the classification and proposed penalty. Mr. Heenan identified
14 Exhibit 3, stipulated in evidence, as two previous confirmed citations
15 for violations which occurred on January 11, 2010 and April 27, 2010.
16 He further testified it is permitted under OSHA regulations to rely on
17 a monitor for fall hazard safety protection but for the system to be
18 acceptable a warning line must also be in place.

19 Respondent presented testimony and documentary evidence in defense
20 of the citation and alleged violation. Mr. Todd Faulkner identified
21 himself as the respondent project manager and in charge of the subject
22 job site at the time of the inspection. He described the job task for
23 which he sent three employees as requiring the placing of plastic
24 sheeting over a portion of the roof to retard water leaks until the
25 weather improved to allow permanent repair. He said the job did not
26 require the use of a stapler/tacking gun and none was on the job site.
27 The work was performed with hammer and nails. He met with CSHOs Tate
28 and Garrett during and at the conclusion of their inspection including

1 the closing conference. He testified that respondent Exhibit A-1 is a
2 fair depiction of the job site and described it as an aerial view of the
3 roof demonstrating a flat section as well as the slope area where Mr.
4 Luevano was working at the time of the inspection. He testified the job
5 was relatively minor, and estimated for completion within approximately
6 two hours. He further testified the CSHOs arrived at about the same
7 time as conclusion of the work, therefore Mr. Luevano's testimony that
8 he unhooked to descend the ladder to obtain more materials was
9 believable.

10 On cross-examination Mr. Faulkner testified he believed Mr.
11 Luevano's testimony, which differed from CSHO Tate. He also believed
12 the testimony was not based upon a fear of termination due to the
13 respondent "zero tolerance" policy for any failures to comply with tie-
14 off protection. He also testified that he relies upon Mr. Luevano to
15 assist him in translating training, as well as questions and answers
16 with employees not conversant in English. Mr. Faulkner confirmed he
17 advised one of the CSHOs that a second anchor point on the roof for two
18 employees to tie off is preferred, but one sufficient.

19 On re-direct and re-cross Mr. Faulkner testified he did not
20 discipline any employees involved in the inspection and citation because
21 he believed Mr. Luevano was properly harnessed except while preparing
22 to descend the roof so there was no violation of company safety policy
23 or OSHA standards. He additionally testified that Mr. Luevano was on
24 the sloped area of the roof but Mr. Provencio on the flat area, although
25 Mr. Provencio was tied off and not subject of citation.

26 Ms. Tamara Ciccletti identified herself as co-owner of the
27 respondent company and testified she investigated the matter herself
28 after the citation. She expressed concern that Mr. Faulkner had signed

1 off on the citation at the closing conference on site thereby limiting
2 her opportunity to participate earlier in defending the charges. She
3 was initially told that OSHA had pictures of her employee working
4 without fall hazard protection but later found no photo of any employee
5 engaged in work without tie off. In her opinion, the photo at Exhibit
6 2 shows only Mr. Luevano preparing to descend from the roof on the
7 ladder. She testified her company maintains a zero tolerance for fall
8 hazard violations and has previously terminated five or six employees
9 constituting approximately 10% of her work force.

10 On cross-examination Ms. Ciccletti testified in response to
11 counsel's questions that she did not believe her employees were altering
12 their stories out of fear of termination but rather telling the truth.
13 She testified that based upon her experience in the company, as well as
14 her own investigation, the employees were telling the truth in
15 describing their conduct which she believed and continues to believe did
16 not demonstrate a violation of OSHA standards.

17 Counsel for complainant called CSHO Kurt Garrett as a rebuttal
18 witness. Mr. Garrett testified he personally observed respondent
19 employee Luevano using a stapler/tacking gun and engaged in work near
20 the edge of the roof. He also observed Mr. Luevano at work on the roof
21 with no attachment to his D-ring, and not properly tied off as required
22 under the cited fall arrest standard. Mr. Garrett testified that he
23 observed employee Luevano actually working and engaged in stapling the
24 plastic material to the wood strip (batton) on the roof.

25 At the conclusion of evidence and testimony, counsel for
26 complainant and respondent presented closing arguments.

27 Complainant asserted the case portrayed two opposing versions of
28 the facts. He argued the photographic evidence supported the testimony

1 of two CSHOs under oath, which was credible, and established the
2 violative working conditions at the job site. He argued there was no
3 personal fall arrest system in use by Mr. Luevano and no **alternate means**
4 **of protection** in place to satisfy the requirements of OSHA. No
5 acceptable **monitor** status could be ascribed to Mr. Provencio. The
6 unrefuted evidence established he was not on the same working surface
7 as Mr. Luevano and further that he was engaged in actual work by
8 providing materials to and assisting Mr. Luevano. Counsel referenced
9 unrefuted OSHA regulations that confirm an employee cannot be engaged
10 in work tasks nor positioned on a different level of work surface while
11 acting as a monitor. He argued respondent could not satisfy the well
12 recognized legal requirements for **alternate compliance** with the specific
13 fall arrest standards. Further, for a monitor system to satisfy the
14 defense of alternate compliance, a warning line is required on the roof
15 structure, and it was undisputed that none existed. Counsel noted that
16 during the closing conference supervisory employee Faulkner admitted he
17 knew termination would occur based on the company zero tolerance policy
18 if there was a violation. Counsel challenged the credibility of
19 respondent witnesses testimony asserting same were affected by threat
20 of termination due to the zero tolerance policy and therefore a basis
21 for accepting the CSHOs version of the facts of violation.

22 Respondent presented closing argument. He asserted that OSHA had
23 not satisfied the legal **burden of proof** to establish a prima facia case
24 for violation. He argued the complainant was asking the board to
25 "construct a burden of proof" to find a violation but without sufficient
26 evidence to rely upon. He argued there was no photo of employee Luevano
27 actually working but rather only one of him facing the camera angle at
28 the top of the ladder and holding no tools. He asserted the CSO

1 testimony that tree branches were in the way to prevent a full view
2 photo of the employee working was not credible and argued a photo would
3 depict the same thing the CSHO saw and should have been provided to
4 satisfy the burden of proof. He further argued the CSHO testimony was
5 not credible as both testified there was a stapler/tacker being used yet
6 none was found at the worksite by them nor depicted in any photos. Mr.
7 Luevano denied using a stapler/tacker. Counsel submitted the hammer on
8 Mr. Luevano's tool belt demonstrated he was utilizing that tool while
9 working and because no photo showed him with a hammer in hand, the facts
10 in evidence supported his testimony that he was not **engaged in work** when
11 observed by the CSHOs. He further argued the testimony of the CSHOs was
12 not credible because they had no photo of the unattached D-ring, yet
13 both testified they observed the violative condition when Mr. Luevano
14 turned to address them. He further argued it would have been impossible
15 for the CSHOs to observe Mr. Luevano actually working with the D-ring
16 attached or unattached due to the angle of the work task directed toward
17 the roof and therefore not with his back to the CSHOs. He argued the
18 photo at Exhibit 2 showed Mr. Luevano in a position to descend the
19 ladder rather than engaged in any work task. There was no photo of Mr.
20 Luevano actually working, and no photo showing Mr. Luevano working
21 without his D-ring attached to a tie-off. He argued it was undisputed
22 that all respondent employees were trained in the company safety policy
23 under an approved plan based upon the testimony of CSHO Tate who also
24 did not cite any violations for same. Counsel further argued that all
25 OSHA training and safety requirements had been established as well as
26 evidence of enforcement, the latter shown by testimony of previous
27 termination of five or six company employees after warnings. He argued
28 the company enforcement practices were meaningful. He asserted evidence

1 of the safety meetings allowed any violation found to be treated as an
2 isolated instance of unpreventable employee misconduct. He argued the
3 testimony and evidence established the proof requirements to support the
4 recognized defense. He further argued that the facts as testified by
5 respondent witnesses were credible. He further argued that although the
6 respondent's employees were supervisory employees, liability should not
7 be imputed to the employer. Based upon current applicable law and
8 Chapter 5 of the Operations Manual, excusable misconduct applies to both
9 regular and supervisory personnel. He concluded by arguing there was no
10 evidence of duration of exposure which is required for a gravity based
11 violation.

12 The board in reviewing the facts, documents, testimony and other
13 evidence must measure same against the established applicable law
14 developed under the occupational safety and health act.

15 In all proceedings commenced by the filing of a
16 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

17 All facts forming the basis of a complaint must be
18 proved by a preponderance of the evidence. Armor
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
19 (1973).

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

27 The testimony of CSHO's Tate and Garrett was more credible than
28 respondent witnesses to establish the noncomplying violative conditions

1 at the worksite. The witness statement signed by Mr. Luevano (Exhibit
2 4) provided he was "tacking" the material as the CSHO's testified rather
3 than "nailing" as Mr. Luevano testified. The witness statement
4 corroborates the observations of the CSHOs.

5 The board finds the complainant met the burden of proof by a
6 preponderance of credible evidence to establish a violation at Citation
7 1, Item 1.

8 The initial burden of proof for a violation rests with OSHA under
9 Nevada law (NAC 618.788(1)); but after establishing same, the burden
10 shifts to the respondent to prove any recognized defenses. See *Jensen*
11 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson*
12 *Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

13 The defense of unpreventable employee misconduct was asserted by
14 respondent.

15 The elements required to support the defense of unpreventable
16 employee misconduct are:

- 17 (1) The employer must establish work rules designated to
18 prevent the violation
- 19 (2) The employer must **adequately communicate** these rules to
20 its employees
- 21 (3) The employer must **take steps to discover** violations
- 22 (4) The employer must **effectively enforce** the rules when
23 violations have been discovered.

24 The board finds that respondent failed to meet the burden of proof
25 by a preponderance of credible evidence to rebut the finding of
26 violation.

27 While the respondent employer demonstrated the existence of a
28 satisfactory safety program and work rules, it failed to establish and
prove the elements of defense recognized by the federal courts and

1 Occupational Safety and Health Review Commission (OSHRC). For an
2 employer to prevail on the defense of unpreventable employee misconduct,
3 it must satisfy its burden of proof by a preponderance of evidence that
4 notwithstanding established safety policies in a safety program which
5 are **effectively communicated and enforced**, the conduct of its employees
6 in violating the policy was unforeseeable, unpreventable or an isolated
7 event.

8 Evidence that the employer effectively communicated
9 and enforced safety policies to protect against the
10 hazard permits an inference that the employer
11 justifiably relied on its employees to comply with
12 the applicable safety rules and that violations of
13 these safety policies were not **foreseeable or
14 preventable**. Austin Bldg. Co. v. Occupational
15 Safety & Health Review Comm., 647 F.2d 1063, 1068
16 (10th Cir. 1981). (emphasis added)

13 When an employer proves that it has **effectively
14 communicated and enforced its safety policies**,
15 serious citations are dismissed. See Secretary of
16 Labor v. Consolidated Edison Co., 13 O.S.H. Cas.
17 (BNA) 2107 (OSHRC Jan. 11, 1989); Secretary of
18 Labor v. General Crane Inc., 13 O.S.H. Cas. (BNA)
19 1608 (OSHRC Jan. 19, 1988); Secretary of Labor v.
20 Greer Architectural Prods. Inc., 14 O.S.H. Cas.
21 (BNA) 1200 (OSHRC July 3, 1989). (emphasis added)

18 An employer has the affirmative duty to anticipate
19 and protect against **preventable** hazardous conduct
20 by employees. Leon Construction Co., 3 OSHC 1979,
21 1975-1976 OSHD ¶20,387 (1976). **Employee
22 misbehavior, standing alone, does not relieve an
23 employer.** Where the Secretary shows the existence
24 of violative conditions, an employer may defend by
25 showing that the employee's behavior was a
26 deviation from a uniformly and **effectively enforced
27 work rule**, of which deviation the employer had
28 neither actual **nor constructive** knowledge. A. J.
McNulty & Co., Inc., 4 OSHC 1097, 1975-1976 OSHD ¶
20,600 (1976). (emphasis added)

25 Here, while the respondent employer did maintain a compliant safety
26 program and general work rules designed to prevent violations, it failed
27 to **effectively** enforce safety rules sufficient to avoid violation.
28 Respondent did not **adequately communicate** safety policies and rules in

1 its work practice to employees for safely carrying out the job tasks.
2 Respondent did not take **meaningful steps to discover** violations on the
3 construction site which were easily preventable through its supervisory
4 representatives. The defense of unpreventable employee misconduct must
5 fail because the violative conditions were **readily foreseeable in plain**
6 **view** and **reasonably preventable**. **Adequately communicated** and
7 **meaningfully enforced** work rules could have prevented the violative
8 conditions and the citation.

9 See Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶23,664 (1979).
10 Accord, Marson Corp., 10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

11 These cases make clear the existence of an
12 employer's defense for the unforeseeable
13 disobedience of an employee who violates the
14 specific duty clause. However, the disobedience
15 defense will fail if the employer does not
16 *effectively communicate and conscientiously enforce*
17 *the safety program at all times. Even when a*
18 *safety program is thorough and properly conceived,*
19 *lax administration renders it ineffective.* P.
20 Gioioso & Sons, Inc. v. OSHRC, 115 F.3d 100, 110-
21 111 (1st Cir. 1997). Although the mere occurrence
22 of a safety violation does not establish
23 ineffective enforcement, Secretary of Labor v.
24 Raytheon Constructors Inc., 19 O.S.H.C. 1311, 1314
25 (2000) the employer must show that it took adequate
26 steps to discover violations of its work rules and
27 an effective system to detect unsafe conditions
28 control. Secretary of Labor v. Fishel Co., 18
O.S.H.C. 1530, 1531 (1998). Failure to follow
through and require employees abide by safety
standards should be evidence that disciplinary
action against disobedient employees progressed to
levels of punishment designed to provide
deterrence. *Id.* See also, Secretary of Labor v.
A&W Construction Services, Inc., 19 O.S.H.C. 1659,
1664 (2001); Secretary of Labor v. Raytheon
Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).
A disciplinary program consisting solely of verbal
warnings is insufficient. Secretary of Labor v.
Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);
Secretary of Labor v. Dayton Hudson Corp., 19
O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary
action that occurs long after the violation was
committed may be found ineffective. (emphasis
added)

1 The evidence and testimony demonstrated that there were **three**
2 supervisory employees involved in the facts of violation.

3 Employee Daryl Barnes, a **company foreman**, was initially designated
4 the job safety monitor but left the site shortly after arrival, taking
5 his vest and other equipment leaving only employees Luevano and
6 Provencio on the job. There was no testimony that company foreman
7 Barnes arranged for a replacement safety monitor to assure compliance
8 with the company safety plan which permits an inference that he lacked
9 adequate training and/or failed to communicate, practice, assure, or
10 implement company safety policies with his co-workers.

11 Mr. Luevano, the **company foreman**, worked for the respondent in that
12 capacity for many years and acted as an assistant to Mr. Faulkner in
13 training other employees in the company safety plan. However, foreman
14 Luevano was the very employee cited for violation of the fall arrest
15 standards. He testified on the OSHA requirements for permitted
16 utilization of a safety monitor, yet identified Mr. Provencio, a **co-**
17 **working employee**, standing on a different surface level is acting in the
18 capacity of monitor. Mr. Luevano demonstrated a lack of adequate
19 training and understanding of the company and OSHA safety rules. He
20 failed to communicate, implement, or assure company or OSHA safety
21 policies when Mr. Barnes left. As a foreman, **meaningfully implementing**
22 safety measures, required more to protect himself and comply with the
23 cited OSHA standards.

24 Mr. Faulkner, the **job supervisor** for the subject project, testified
25 he was also responsible for company safety, training and enforcement.
26 Mr. Luevano, the violating employee and foreman of the company, was
27 identified by Mr. Faulkner as regularly assisting him in communicating
28 safety rules and training issues to individuals who spoke only Spanish

1 or without facility in the English language. Mr. Luevano testified he
2 understood and spoke English. However, he demonstrated to the board
3 while testifying under oath a lack of meaningful understanding of OSHA
4 regulations and supervisory management. Yet, Mr. Faulkner testified
5 that he relied upon Mr. Luevano to assist him in translating,
6 communicating, and employee questions for training Spanish speaking
7 personnel in the company safety policies and practices. Mr. Faulkner
8 did not discipline or terminate Mr. Luevano for violative conduct.

9 Further, when Mr. Barnes called Mr. Faulkner to inform he was
10 leaving the job, Mr. Faulkner did nothing to replace him with another
11 monitor at the job site.

12 The testimony of two (2) supervisory employees, Faulkner and
13 Luevano, demonstrated a deficiency in the company safety program due to
14 an apparent failure of adequate communication, meaningful
15 implementation, discovery of violative conditions, and effective
16 enforcement of safety policies. All supervisory employees involved in
17 the incident, Barnes, Luevano, and Faulkner demonstrated by their
18 actions and/or testimony a lack of meaningful understanding of what was
19 required under the company safety policies, and that which was to be
20 implemented and enforced at the subject job site.

21 The testimony and evidence of respondent witnesses did not
22 demonstrate a preponderance of credible evidence to satisfy respondent's
23 burden of proof to establish the defense of an isolated violative
24 incident or unpreventable employee misconduct.

25 Messrs. Faulkner and Luevano identified themselves as supervisory
26 employees of respondent. Both conducted safety training for respondent
27 employees under the authorization of respondent. Actions of supervisory
28 personnel can be imputed to the respondent employer under general

1 occupational safety and health law. This well established precedent was
2 confirmed by the Nevada Supreme Court which provided that "... a
3 supervisor's knowledge of deviations from standard building practices
4 is properly imputed to the respondent ..." See *Division of Occupational*
5 *Safety and Health v. Pabco Gypsum*, 105 Nev. 371, 775 P.2d 701 (1989).
6 *D.A. Collins Construction Co.*, supra at page 15.

7 Evidence that a foreman or supervisor violated a standard permits
8 an inference that the employer's safety program was not adequately
9 enforced. (See *D.A. Collins Construction Co. v. Secretary of Labor*, 117
10 F.3d 691, 695 (2d Cir. 1997); *Harry C. Crooker & Sons, Inc. V.*
11 *Occupational Safety & Health Review Commission*, 537 F3 79, 85 (1st Cir.
12 2008).)

13 A "serious" violation is established upon a preponderance of
14 evidence in accordance with NRS 618.625(2) which provides in pertinent
15 part:

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

21 The unrefuted testimony of the working height of employee Luevano
22 without a fall hazard arrest system in place established the substantial
23 probability that serious injury or death could occur from a fall.

24 The penalty was calculated in accordance with the evidence and
25 proof as to the seriousness of the violative conduct and the potential
26 for serious injury or death.

27 A "repeat" violation is established if based upon a prior violation
28 of the same standard, a different standard, or general duty clause, if

1 the present and prior violation is substantially similar.

2 A violation is considered a repeat violation:

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

20 A repeated violation may be found based on a prior
21 violation of the same standard, a different
22 standard, or the general duty clause, but the
23 present and prior violations must be substantially
24 similar. Caterpillar, Inc., 18 OSH Cases 1005,
25 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18
26 OSH Cases 1481 (7th Cir. 1998); GEM Indus., Inc., 17
27 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
28 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
substantially similar hazards. It is not necessary,
however, that the seriousness of the hazard
involved in the two violations be the same.
Rabinowitz, Occupational Safety and Health Law, 2nd
Ed. 2008 at pp. 230-231. (emphasis added)

The evidence was uncontroverted that respondent had been charged

