

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, STATE OF NEVADA

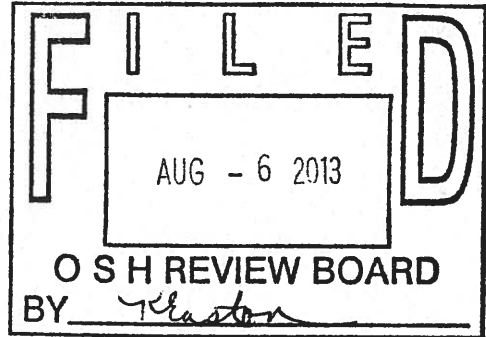
Docket No. LV 13-1640

Complainant,

vs.

10 PWI CONSTRUCTION, INC.,

11 Respondent.
12 _____/



13
14 **DECISION**

15 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
16 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of July 2013,
17 in furtherance of notice duly provided according to law, MR. MICHAEL
18 TANCHEK, 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 MR. WILLIAM
21 MCGAHA, ESQ. appearing on behalf of Respondent, **PWI CONSTRUCTION, INC.**;
22 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

25 The complaint filed by the OSHA alleges violations of Nevada
26 Revised Statutes as referenced in Exhibit "A", attached thereto.

27 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(4)(i)
28 as follows:

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1 **Citation 1, Item 1:** 29 CFR 1926.501(b)(4)(i): Each employee
2 on walking/working surfaces was not protected from falling
3 through holes (including skylights) more than 6 feet (1.8 m)
4 above lower levels, by personal fall arrest systems, covers,
5 or guardrail systems erected around such holes.

6 The controlling employer failed to ensure that subcontracted
7 employees, installing a metal guard rail system, were
8 protected from falling through a 66 foot by 66 foot (sic) 5
9 foot by 4 foot by 23 foot deep floor hole in the stage at the
10 Venetian Resort Hotel Casino/Palazzo Resort Hotel's Phantom
11 of the Opera theater. The basement floor was 23 feet below
12 the opening. The employees were staging free standing
13 portable guard rails (cattle guards) within 3 feet of the
14 edge of the hole and were not protected by fall arrest
15 systems, covers or guardrail systems. Subcontracted
16 employees were exposed to possible serious injury from a fall
17 of 23 feet.

18 The violation was classified as "Serious". The proposed penalty
19 for the alleged violation is in the amount of \$2,000.00.

20 Citation 1, Item 2, charges a violation of 29 CFR 1926.850(i) as
21 follows:

22 **Citation 1, Item 2:** 29 CFR 1926.850(i): All floor openings,
23 not used as material drops, shall be covered over with
24 material substantial enough to support the weight of any load
25 which may be imposed. Such material shall be properly
26 secured to prevent its accidental movement.

27 The controlling employer failed to ensure that subcontracted
28 employees, installing a metal guard rail system, were
29 protected from falling through a 5 foot by 4 foot by 23 foot
30 deep hole in the stage at the Venetian Resort Hotel
31 Casino/Palazzo Resort Hotel's Phantom of the Opera theater.
32 The floor hole was covered by 1-1/4 inch plywood that was not
33 secured. Subcontracted employees were staging free standing
34 guard rails (cattle guards) within 3 feet of the edge of the
35 hole and were exposed to possible serious injury if the
36 plywood was accidentally displaced.

37 The violation was classified as "Serious". The proposed penalty
38 for the alleged violation is in the amount of \$1,700.00.

39 Complainant and respondent stipulated to the admission of
40 documentary and photographic evidence at complainant's Exhibits 1
41 through 3 and respondent's Exhibits A and B.

1 Complainant presented evidence of the alleged violations. Mr.
2 Robert Harris, a certified safety and health officer (CSHO) testified
3 as to his inspection and the citations issued to the employer. He
4 identified Exhibit 1 in evidence as his inspection report and narrative.
5 Mr. Harris' investigative findings confirmed the worksite to be a **multi-**
6 **employer construction site** as defined under occupational safety and
7 health law. PWI Construction, Inc., the respondent, was the general and
8 **controlling** contractor; West Coast Concrete a subcontractor. An
9 employee of West Coast Concrete identified as Mr. Benedict James "Benny"
10 Burns fell 23 feet through a hole in the stage floor while supervising
11 and assisting with installation of guardrails at the Phantom of the
12 Opera theater in the Venetian Hotel and Casino. Mr. Burns suffered
13 severe multiple fractures confirmed as **serious** injuries.

14 PWI Construction was hired under contract to manage construction
15 work involving demolition and rebuilding of portions of the stage
16 facility. West Coast Concrete was initially tasked to protect the hole
17 openings in the stage floor by installing guardrails. Employees from
18 West Coast Concrete started moving mobile guardrails (k-rails) into the
19 theater on 9/28/12. West Coast Concrete employee Antonio Tascano placed
20 two k-rails within three feet at the edge of floor hole openings and
21 returned to his truck to obtain a third k-rail. Employee Burns bent
22 over to move a piece of plywood that was lying on the floor in the area
23 where the third k-rail was to be installed. He was unaware the plywood
24 covered a very large hole in the stage floor measuring approximately 5
25 foot by 4 foot by 23 foot deep. The plywood as **not secured nor marked**
26 with the word "hole". While moving the plywood, Mr. Burns fell into the
27 hole and subsequently 23 feet to the level below suffering multiple
28 fractures to his face, hands, wrist, pelvis and knees. CSHO Harris

1 found no evidence that fall protection was utilized by any West Coast
2 Concrete employees at the time of the accident. Mr. Harris testified
3 he found a violation of 29 CFR 1926.501(b)(4)(i) and cited both the
4 respondent PWI Inc. as the general and **controlling** contractor, as well
5 as West Coast Concrete, the subcontractor employer of exposed employees
6 including Mr. Burns who fell through the hole. The floor hole through
7 which Mr. Burns fell measured approximately 5 foot by 4 foot by 23 feet
8 deep. All the referenced employees of West Coast Concrete were
9 unprotected from a fall. Mr. Harris informed respondent Superintendent
10 Jenkins of the proposed citation to PWI as the **controlling employer** on
11 the multi-employer construction site.

12 Mr. Harris further testified with regard to Citation 1, Item 2, 29
13 CFR 1925.850(i). He testified on his investigative findings and
14 explained item 2 was cited under subpart M because the demolition
15 standard (subpart T) does not include some specific requirements
16 addressing employee protection from hole fall hazards. He explained 29
17 CFR 1926.850(i) addresses coverings for floor openings **not used as**
18 **material drops**. He found that at the time of the accident other
19 subcontractors in the area were using this hole to move material and
20 equipment from the main stage area to the basement. However, the hole
21 exposure required similar guarding protection and employee fall arrest
22 systems.

23 CSHO Harris testified in support of his classifications of **Serious**
24 based upon the exposure of injuries sustained by employee Burns and
25 exposure to the hole hazard by the West Coast Concrete laborers and any
26 other employees to the potential of falls at the worksite. He testified
27 the calculations of the penalties were assessed in accordance with the
28 operations manual, and explained the credits rendered to the employer.

1 He testified the **controlling employer**, PWI as the general, had a duty
2 to **secure** the plywood on the top of the very large hole and take other
3 reasonable steps to safeguard the site which would include marking the
4 plywood as a "hole" to protect all potentially exposed employees as
5 required in the standard. Mr. Burns was not wearing a safety harness
6 at the time of the accident, nor did CSHO Harris find any evidence other
7 employees working in the area were wearing harnesses. He cited both the
8 general and subcontractor employers based upon the duty to ensure the
9 safety of employees working on the site. PWI was cited as the
10 controlling employer based upon the OSHA multi-employer enforcement
11 policy and guideline.

12 On cross-examination Mr. Harris testified that under the **demolition**
13 standard an employer is required to only cover and secure holes, but
14 under the **construction** standard holes must be covered, secured and
15 additionally marked.

16 On further cross-examination Mr. Harris testified that the
17 controlling employer was required to do more under the OSHA standards
18 to safeguard the site than what was explained to him by respondent
19 superintendent Jenkins and other employees. He testified Mr. Jenkins
20 informed him that he did not perform any type of inspection of the area
21 prior to the start of work on 9/28/12. He concluded in his
22 investigation report that with reasonable diligence the respondent could
23 have ensured the subcontractor employees tasked to install the guardrail
24 systems around an approximate 5 foot by 4 foot floor hole opening and
25 other holes were protected from the fall hazards. The employees were
26 working within three feet of the floor hole edge. He further testified
27 that PWI, as the general and responsible contractor in charge of the
28 subcontractors, including West Coast Concrete, knew what the job

1 required to address the floor hole openings left by removal of the
2 equipment from the prior show. PWI did not properly inspect the work
3 area and detect that plywood laying on the floor actually covered
4 existing holes not secured in place nor marked "hole". He concluded
5 that with reasonable diligence they could have detected the floor hole
6 through which Mr. Burns fell was covered with plywood and not properly
7 secured or marked prior to allowing the subcontractors in the area to
8 commence demolition or guardrail work.

9 Mr. Benedict James "Benny" Burns identified himself a foreman
10 employee of West Coast Concrete and the individual who fell through the
11 large floor opening. He explained his assigned duties as a foreman on
12 the day of the accident to include supervising the two employees working
13 under him performing guardrail installation. He testified that he
14 walked the area the day before the accident before and inspected the
15 areas to be demolished. He also noted the areas for steel to be erected
16 and concrete poured by his company. He was aware of multiple holes in
17 the deck floor on the day he fell because of his previous inspection.
18 He testified the two employees working under him were issued harnesses
19 for use when they were actually installing the guards and he was there
20 to inspect the site and supervise. He further testified he was
21 assisting the laborers bringing in the guardrails, although it was only
22 the laborers who were to install the guards near the holes. He was not
23 aware all the holes were to be guarded, particularly the smaller ones.
24 He described his efforts to lift a sheet of plywood from the large hole
25 in which he fell and testified that during the movement he only
26 remembers the initial fall and then awaking in the hospital.

27 On cross-examination Mr. Burns testified his reason for the site
28 inspection on the day before the accident was to review the holes to be

1 guarded. He thought the smaller holes were not to be guarded so he did
2 not pay attention to them. He does not recall any discussion with his
3 employer owner Mr. Belknap or Mr. Jenkins of PWI, Inc. regarding his not
4 being authorized or instructed to participate in the guardrail
5 installation work. He testified that harnesses were at the site but he
6 chose not to equip himself with the PPE. He further testified he was
7 aware of the risk of falling through the deck hole because he was at the
8 site the day before. He confirmed that he met with his company owner
9 Mr. Belknap to identify and discuss the scope of work to be performed.

10 At the conclusion of complainant's case respondent presented
11 testimony and evidence in defense of the violations. Mr. Kenny Belknap
12 identified himself as the owner of West Coast Concrete, the
13 subcontractor at the site and employer of injured foreman employee Burns
14 and the two identified laborers. He met with Mr. Burns in his office
15 on the morning of the accident and explained the personal protective
16 equipment (PPE) and what was needed for safety compliance at the site.
17 He could not explain why Mr. Burns chose not to use the safety equipment
18 that was at the site on the morning of the accident. There was a "gang
19 box" on the site with all the safety equipment inside and included all
20 types of fall arrest PPE. He testified that he personally instructed
21 Mr. Burns on how to use the safety equipment, and told him just to show
22 the laborer employees what to do and specifically that he (Burns) was
23 not to perform any labor work.

24 Mr. Ron Jenkins identified himself as the Superintendent of
25 respondent. He testified that he met with Mr. Byrd, the Vice President
26 of respondent in charge of the project to review the work process for
27 covering the holes and assuring safety at the site. He further
28 testified that he met with Mr. Burns the day before the accident and

1 reviewed the harness and safety for fall arrest and what had to be done
2 at the site and to assure tie-off of the employees. He walked the area
3 with Mr. Burns and noted covered holes in the deck which needed to be
4 guarded and referenced the gang box on the site and location of the
5 safety equipment.

6 On cross-examination Mr. Jenkins testified the plywood covering the
7 hole through which Mr. Burns fell was ". . . strapped down by screws a
8 couple of days before the accident so Benny had to undo it and it was
9 a 30 foot heavy piece of wood which required substantial effort to
10 remove and uncover the hole . . .".

11 Mr. Garrett Byrd identified himself as the Vice President of
12 construction services for PWI at the time of the accident and
13 responsible for the job. He testified the subcontractor was to place
14 guardrails on every hole, small and large. Two site inspections had
15 been conducted to assess the work task and safety with Mr. Belknap, the
16 owner of West Coast Concrete. He testified that PWI and its employees
17 did all they reasonably could to safeguard the site and prevent the
18 accident which included a previous walkthrough of the site with the
19 subcontractor supervisor Mr. Burns. The safety equipment was there and
20 he could do nothing more to assure Mr. Burns and other West Coast
21 Concrete employees would wear the PPE. He expressed his concern that
22 Mr. Burns, the very man sent to assure safety by the subcontractor,
23 failed to utilize the safety equipment himself and suffered the
24 unfortunate accident.

25 On cross-examination, Mr. Byrd testified that he knew Mr. Burns was
26 the employee responsible for safety on the site for the subcontractor
27 but unaware that Mr. Burns did not hold an "OSHA-30 card". He said the
28 guardrails being installed were to prevent any employees on the site

1 from falling through the holes while working in the area.

2 Complainant and respondent submitted closing argument.

3 Complainant argued the evidence established the work area was
4 clearly a **multi-employer construction** site as defined in applicable OSHA
5 law and respondent **in control** of the work process. The respondent and
6 its supervisory employees were responsible to assure compliance with all
7 safety standards. Counsel further asserted the burden of proof had been
8 met by the complainant and the violations, classifications and penalties
9 should be confirmed.

10 Respondent presented closing argument asserting that PWI did
11 everything required under the law to assure safety as a "controlling
12 contractor". He argued there is no strict liability for an employer
13 under the law. Mr. Burns was the subcontractor supervisory employee in
14 charge of safety and committed employee misconduct. Mr. Burns unscrewed
15 and lifted a very heavy piece of plywood covering the floor opening and
16 fell through based on his own misconduct and not due to any failures on
17 the part of the respondent. Counsel argued the subcontractor
18 supervisory misconduct was established and rebut any findings of
19 violations against the respondent general and controlling contractor.

20 The board reviewed the facts in evidence and weighed the testimony
21 provided by the witnesses of complainant and respondent. The board
22 finds a preponderance of evidence to support violations of the cited
23 safety standards referenced at Citation 1, Items 1 and 2.

24 N.A.C. 618.788(1) provides:

25 In all proceedings commenced by the filing of a
26 notice of contest, the burden of proof rests with
the Administrator.

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶

1 16,958 (1973).

2 To establish a prima facie case, the Secretary
3 (Chief Administrative Officer) must prove 1) the
4 cited standard applies; 2) the requirements of the
5 standard were not met; 3) employees were exposed to
6 or had access to the violative condition; 4) the
7 employer knew or, through the exercise of
8 reasonable diligence could have known of the
9 violative condition; 5) there is substantial
probability that death or serious physical harm
could result from the violative condition (in a
"serious" violation case). See *Bechtel
Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶ 18,906
(1974); *D.A. Collins Construction Co. Inc., v.
Secretary of Labor*, 117 F.3d 691 (2nd Cir. 1997).
(Emphasis added)

10 A "serious" violation defined in NRS 618.625(2) provides in
11 pertinent part:

12 ". . . a serious violation exists in a place of
13 employment if there is a substantial probability
14 that death or serious physical harm could result
15 from a condition which exists or from one or more
16 practices, means, methods, operations or processes
17 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.**" (Emphasis
added)

18 The testimony and evidence establish the facts of violation and
19 applicability of the cited standards. Respondent, while not the
20 employer of the injured employee involved in the accident, was the
21 general contractor in charge of the work site and vested with **control**
22 as interpreted under occupational safety and health law.

23 Although OSHA may satisfy the exposure element by
24 showing that the exposed employees are those of
25 cited employer, this is not necessary for
26 violations of Section 5(a)(2). OSHA may instead
27 show exposure of an employee of some employer and
28 that the cited employer **controlled** or created the
violative condition. This is the legal theory used
by OSHA to cite general contractors and their
higher-tier subcontractors for violations to which
employees of subcontractors are exposed or that
subcontractors created. Under this doctrine, a

1 general contractor is responsible for those
2 violations that **'it could reasonably be expected to**
3 **prevent or detect.'** *Anthony Crane Rental Inc. V.*
4 *Reich*, 70 F.3d 1298, 1305, 17 OSH Cases 1447 (D.C.
5 Cir. 1995). *Huber, Hunt & Nichols, Inc.* 4 OSH
6 Cases 1406, 1407-08 (Rev. Comm'n 1976). *Harvey*
7 *Workover Inc.*, 7 OSH Cases 1687, 1689 (Rev. Comm'n
8 1979); *IBP Inc. V. Herman*, 144 F.3d 861, 18 OSH
9 Cases 1353 (D.C. Cir. 1998), *rev'g* 17 OSH Cases
10 2073 (Rev. Comm'n 1997). *David Weekley Homes*, 19
11 OSH Cases 2127, 2130 (Rev. Comm'n 1994); *Blount*
12 *Int'l Ltd.*, 15 OSH Cases 1897, 1899 (Rev. Comm'n
13 1992). (emphasis added)

8 OSHA must prove that the employer actually knew, or
9 could have known, with the exercise of reasonable
10 diligence, of the **physical circumstances that**
11 **violate the Act.** The element requires OSHA to
12 establish the employer's actual or constructive
13 knowledge of the **physical circumstances that**
14 **comprise the violation.** OSHA is not required to
15 show that the employer knew the conditions violated
16 the Act or posed a hazard to employees. *New York*
17 *State Gas & Elec. Corp. v. Secretary of Labor*, 88
18 F.3d 98, 105, 17 OSH Cases 1650 (2d Cir. 1996);
19 *Pennsylvania Power & Light Co. V. OSHRC*, 737 F.2d
20 350, 11 OSH Cases 1985 (3d Cir. 1984); *Ragnar*
21 *Benson Inc.*, 18 OSH Cases 1937, 1939 (Rev. Comm'n
22 1999); *Continental Elec.*, 13 OSH Cases 2153, 2154
(Rev. Comm'n 1989) (knowledge is a required element
even for nonserious violations). *East Tex. Motor*
Freight v. OSHRC, 671 F.2d 845, 849, 10 OSH Cases
1457 (5th Cir. 1982); *Ormet Corp.*, 14 OSH Cases
2134, 2138 (Rev. Comm'n 1991); *Southwestern*
Acoustics & Specialty Inc., 5 OSH Cases 1091 (Rev.
Comm'n 1977) (**employer need be shown only to have**
had knowledge of 'physical conditions which
constitute a violation,' not that condition was
prohibited by law). See *Ed Taylor Constr. Co. v.*
OSHRC, 983 F.2d 1265, 1272, 15 OSH Cases 1238 (11th
Cir. 1991) (employers are charged with knowledge of
matters duly published in Federal Register).
(emphasis added)

23 In general, the actual or constructive knowledge of
24 a supervisory employee will be so imputed, and thus
25 constitute a prima facie showing of knowledge.
26 Where supervisory knowledge can be imputed, OSHA
27 need not also show that there were deficiencies in
the employer's safety program. *Halmar Corp.*, 18
OSH Cases 1014, 1016-17 (Rev. Comm'n 1997), *aff'd*
on other grounds, 18 OSH Cases 1359 (2d Cir. 1998).

28 Rabinowitz Occupational Safety and Health Law,
2008, 2nd Ed., pages 84-87.

1 The board finds at Citation 1, Item 1 and 2, that complainant's
2 initial burden to prove the violations was met by the unrebutted sworn
3 testimony of CSHO Harris, and the evidence admitted in the record at
4 Exhibits 1 through 3.

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

10 Respondent asserted the recognized defense of **unpreventable**
11 **employee misconduct.**

12 The defense (**unpreventable employee misconduct**) has
13 been stated in various ways, but it basically
14 requires an employer to show that its employees
15 were required to take protective measures that
16 would comply with the standard and it enforced that
17 requirement. *E.g.*, *Brock v. L.E. Myers Co.*, 818
18 F.2d 1270, 13 OSH Cases 1289 (6th Cir.), cert.
19 *Denied*, 484 U.S. 989 (1987); *Texland Drilling*
20 *Corp.*, 9 OSH Cases 1023 (Rev. Comm'n 1980). The
21 Commission has distilled its decisions as requiring
22 **four elements of proof:** that (1) the employer has
23 established work rules designated to prevent the
24 violation; (2) it has **adequately communicated those**
25 **rules to its employees;** (3) it has **taken steps to**
26 **discovery violations;** and (4) it has effectively
27 enforced the rules when violations have been
28 discovered. *E.g.*, *Capform Inc.*, 16 OSH Cases 2040,
2043 (rev. Comm'n 1994). Rabinowitz Occupational
Safety and Health Law, 2008, 2nd Ed., pages 156.

22 An employer has the affirmative duty to **anticipate and protect**
23 **against preventable hazardous conduct by employees.** *Leon Construction*
24 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). Employee misbehavior,
25 standing alone, does not relieve an employer. Where the Secretary shows
26 the existence of violative conditions, an employer may defend by showing
27 that the employee's behavior was a deviation from a uniformly and
28 **effectively enforced work rule, of which deviation the employer had**

1 **neither actual nor constructive knowledge.** *A. J. McNulty & Co., Inc.,*

2 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

3 In order to establish an unpreventable employee
4 misconduct defense, the employer must establish
5 that it had: established work rules designed to
6 prevent the violation; **adequately communicated**
7 **those work rules** to its employees (including
8 **supervisors**); taken **reasonable steps to discover**
9 **violations of those work rules**; and **effectively**
10 **enforced those work rules** when they were violated.
11 *New York State Electric & Gas Corporation*, 17 BNA
12 OSHC 1129, 1195 CCH OSHD ¶ 30,745 (91-2897, 1995).
13 (Emphasis added)

9 Although there is a similar doctrine of **supervisory**
10 **misconduct**, some cases characterize it not as an
11 affirmative defense but as a **rebuttal of the**
12 **imputation to the employer of the supervisor's**
13 **knowledge.** The Commission has stated that
14 **involvement by a supervisor in a violation is**
15 **"strong evidence that the employer's safety program**
16 **was lax."** "Where a supervisory employee is
17 involved, the proof of unpreventable employee
18 misconduct is **more rigorous and the defense is more**
19 **difficult to establish since it is the supervisors'**
20 **duty to protect the safety of employees under their**
21 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases
22 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
23 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
24 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
25 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
26 Safety and Health Law, 2008, 2nd Ed., page 157.
27 (Emphasis added)

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

22 It is well settled that the **knowledge, actual or**
23 **constructive, of an employer's supervisory**
24 **personnel** will be imputed to the employer, unless
25 the employer establishes **substantial grounds** for
26 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
27 93 CCH OSHD ¶ 29,254 (No. 85-531 1991). The
28 Commission held that once there is a prima facie
showing of employer knowledge through a supervisory
employee, the employer can rebut that showing by
establishing that the failure of the supervisory
employee to follow proper procedures was
unpreventable. In particular, the employer must
establish that it had relevant work rules that it

1 adequately communicated and effectively enforced.
2 *Consolidated Freightways Corp.*, 15 BNA OSHC 1317,
3 1991-93 CCH OSHD ¶ 29,500 (No. 86-531, 1991).
(Emphasis added)

4 **Employer knowledge, foreseeability, and lack of safety enforcement**
5 **by supervisory personnel prevents reliance upon the defense of**
6 **unpreventable employee misconduct to relieve respondent of liability.**

7 The defense of unpreventable employee misconduct and the burden of proof
8 to satisfy same requires **substantial** evidence under applicable law.
9 There was insufficient evidence to establish the defense and rebut the
10 proof of violation.

11 The weight of evidence corroborates the CSHO testimony and
12 investigative report. Both West Coast Concrete Inc. and PWI
13 Construction were responsible for the safety of their employees at the
14 worksite. The area was a **multi-employer worksite**. PWI as the
15 **controlling** employer was responsible to assure the safety of its own
16 employees and the **employees of other employers** including West Coast
17 Concrete. Evidence and testimony established that notwithstanding the
18 testimony of respondent witnesses for safety compliance at the site to
19 avoid Mr. Burns' accident **and exposure to other employees**, the facts of
20 violation, the applicability of the standard and the exposure to the
21 employees of West Coast Concrete, including Mr. Burns, were proven by
22 a preponderance of evidence and must be confirmed.

23 While the Nevada Occupational Safety and Health Review Board has
24 adopted the expanded employee misconduct defense to include supervisory
25 employees, the facts and weight of evidence are insufficient to meet
26 respondent's burden of proof to rebut the prima facie case of violation.
27 The respondent **controlling employer** supervisory personnel had an
28 affirmative duty to assure all employees of West Coast Concrete,

1 including foreman Burns, were in compliance with all fall arrest
2 standards. Regardless of Mr. Burns accident, he and other employees
3 were exposed to unprotected fall hazards. Reasonable diligence and
4 foreseeability under the applicable law require imposition of liability
5 on the respondent under the multi-employer worksite doctrine.

6 It is the decision of the Nevada Occupational Safety and Health
7 Review Board that violations occurred as to Citation 1, Item 1, 29 CFR
8 1926.501(b)(4)(i) and Citation 1, Item 2, 29 CFR 1926.850(i). The
9 violations were properly classified as serious. The proposed penalties
10 are confirmed in the amount of TWO THOUSAND DOLLARS (\$2,000.00) at
11 Citation 1, Item 1, and ONE THOUSAND SEVEN HUNDRED DOLLARS (\$1,700.00)
12 at Citation 1, Item 2.

13 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
14 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
15 **DIVISION OF INDUSTRIAL RELATIONS,** to prepare and submit proposed
16 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
17 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
18 within twenty (20) days from date of decision. After five (5) days time
19 for filing any objection, the final Findings of Fact and Conclusions of
20 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
21 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and
22 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**
23 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the
24 **BOARD.**

25 DATED: This 6th day of August, 2013.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 By: /s/
JOE ADAMS, CHAIRMAN