NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

vs.

WOODLAND FRAMING, INC.,

Respondent.

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Docket No. LV 13-1660

D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 14th day of August 2013, in furtherance of notice duly provided according to law, DONALD SMITH, ESQ., counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations** (OSHA), and CHRISTOPHER McCULLOUGH, ESQ., appearing on behalf of respondent, **WOODLAND FRAMING, INC.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

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

Citation 1, Item 1 charges a violation of 29 CFR 1926.501(b)(1). The complainant alleges two respondent employees were engaged in framing

activities approximately 27 feet from the ground level and were not connected to anchor points. The violation was classified as a **Repeat/Serious** and a proposed penalty assessed at Four Thousand Dollars ($4,000.00).

Counsel for the complainant and respondent stipulated to the admission of respective evidence packets identifying complainant Exhibits 1 through 5, and respondent Exhibits A through L.

Counsel for the Chief Administrative Officer presented testimony and evidence with regard to the alleged violations. Certified Safety and Health Officer (CSHO) Mr. Eric Aros testified that on or about April 24, 2013 he conducted an inspection of the respondent's construction work site in Las Vegas, Nevada. Mr. Aros referenced the Exhibit 1 inspection reports and identified photographs at Exhibit 2. CSHO Aros testified he observed two respondent employees working on a roof structure wearing safety harnesses but without "tie-off" to any anchor points. Mr. Aros confirmed from the blue prints that the height of the working surface from the ground level was approximately 27 feet which required fall protection under the cited standard. After identifying the hazard, he confirmed the violation should be classified as serious due to the likelihood of serious injury or death by a fall from the working height to the ground level. He described the injuries to be sustained by an employee falling from the working height and the method for calculating the proposed penalty. Mr. Aros further testified with regard to the prior violation by respondent for a similar citation which provided a basis for the repeat/serious classification and identified the documentary evidence to confirm same.

On cross-examination, Mr. Aros testified respondent employee Corona admitted during the investigation that the employees were on the roof

for a "few minutes" without tie-off. He further confirmed the fall arrest system safety equipment had been provided by the employer. (See Corona witness statement Exhibit 1, Page 18.) In continuing responses to cross-examination Mr. Aros testified he was informed the lead employee, Mr. David Kauffman told the subject employees to tie-off the morning of the inspection, which they had done but apparently later disconnected. (See Kauffman witness statement Exhibit 1, Page 19.) Counsel inquired as to why this would not be a case of unpreventable employee misconduct for intentionally disconnecting their tie-off. Mr. Aros responded the employees were not following instructions and while told they had previously been disciplined he felt the defense would have been sufficient if it was a first violation. Counsel inquired as to whether an employee who intentionally breaks the law is committing employee misconduct, to which CSHO Aros responded affirmatively. Counsel referenced NRS 618.605 and paraphrased the statute as providing that ". . . an employee cannot remove protection . . ." and inquired of the witness if that was correct. Mr. Aros responded affirmatively. Counsel further inquired whether it was logical to assume the employees unhooked themselves if they were first seen attached and then later disconnected. Mr. Aros responded he was unable to answer the question. Counsel continued inquiry and questioned whether the witness had any information to contradict the fact that no employee of respondent had suffered a fall injury in 110,000 reported hours of work. Mr. Aros indicated he was unable to answer.

At the conclusion of the complainant's case, the respondent presented testimony and documentary evidence in defense of the citation. Respondent witness, Mr. Kim Ecott, identified himself as the 31 year general manager for respondent and it's predecessor company. He

testified the respondent provided all equipment and training required by OSHA together with close supervision of its employees. He testified that on the particular job he personally inspected the worksite daily in both the morning and evening hours. Mr. Ecott testified he has repeatedly warned and disciplined employees for fall hazard compliance, but it is extremely difficult to assure compliant employees in the framing business due to the extensive Las Vegas labor shortage of qualified framers. He identified and testified with regard to the respondent's Exhibit K, safety manual, Exhibit G, the warnings given to the two employees involved in the cited violation, and the company disciplinary program. He explained the program requires first a verbal warning, then a written reprimand and on the third instance the employee is terminated. He identified Exhibit J as examples of other disciplinary notices rendered to other employees.

On cross-examination Mr. Ecott testified there was no foreman on the job site at the time of the inspection. The respondent authority to discipline is vested in the foreman, general manager and owner. He testified to overseeing the site himself because there were only eight employees working and there were other job duties and job sites that required attention. He testified that he checked this job regularly in the morning and the afternoon, as well as other sites, but at different times so that the employees would be unable to predict his times of arrival. Mr. Ecott testified the fall protection safety plan had been provided to the subject employees and referenced the documentary evidence in support of same. He was questioned as to the document pages appearing different, but explained that certain areas had been updated and inserted in the plan. He further testified the subject employees did review the plan and underwent safety training and in fact

retraining. Mr. Ecott explained the subject employees quit after being previously disciplined and easily obtained other work immediately due to the labor shortage, then later rehired and retrained by the respondent. He described the retraining process involved as part of the company standard practice.

At conclusion of the respondent case, the complainant and respondent presented closing argument.

Complainant argued the burden of proof had been met to establish the violation as cited and the repeat status confirmed without rebuttal. He asserted that it was undisputed the two employees on the roof were not tied off, working at a hazardous fall height as governed by the standard and would clearly suffer serious injury or death from a fall at the working height. Counsel identified the key issue of the case as whether the asserted defense of employee misconduct had been established. Counsel argued the defense of employee misconduct must fail because the respondent had not met its burden of proof to establish same. He noted the company had employee compliance problems at its worksite because there was no foreman nor a full time general manager which was evidence of ineffective enforcement of the safety rules and its own plan.

Respondent presented closing argument and reviewed the bases for finding no violation due to unpreventable employee misconduct. He argued the board must draw inferences from the unrebutted evidence which included 110,000 man hours without a single fall accident, so the ". . . employer must be doing things right . . .." He asserted the respondent is a safe employer and there was no problem found by the CSHO with regard to the company safety plan and training. He argued that termination of employees for infractions simply does not work because

they ". . . get rehired across the street . . . due to the shortage of qualified framing employees in the Las Vegas area . . .." The respondent rehired the subject employees after previous violation but took the reasonable steps of retraining them in safety, which should be found as evidence, directly or by inference, of meaningful enforcement to support the defense of unpreventable employee misconduct. Counsel argued that employees break the law by unhooking their own safety attachment line, despite all the training and oversight, but ". . . an employer simply cannot fire everybody nor can it oversee everyone on every day at all job sites . . .." He asserted that this was a classic case of unpreventable employee misconduct and the board should find no violation based upon the facts in evidence and the recognized case law.

In reviewing the testimony, evidence, exhibits and arguments of counsel, the board is required to measure same against the elements to establish violations under Occupational Safety & Health Law based upon the statutory burden of proof and competent evidence.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
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> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).

A "serious" violation is established in accordance with NRS 618.625(2) which provides in pertinent part:

> . . . a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more 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.
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> To establish a prima facie case, the Secretary

(Chief Administrative Officer) must prove the existence of a violation, the exposure of employees, the reasonableness of the abatement period, and the appropriateness of the penalty. *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew or with the exercise of reasonable diligence** could have known of the 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).

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The board finds that while the complainant evidence to support for the burden of proof of violation at Citation 1, Item 1, the respondent met its burden of proof to rebut and avoid a finding of violation through the recognized defense of **unpreventable employee misconduct.** The burden of proof rests with OSHA under Nevada law (NAC 618.788); but after establishing same, the burden shifts to the respondent to prove any recognized defenses. See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

The elements required for the defense of unpreventable employee misconduct are:

(1) The employer must establish **work rules** designated to prevent the violation

(2) The employer must **adequately communicate** these rules to its employees

(3) The employer must take **steps to discover violations**

(4) The employer must **effectively enforce the rules** when violations have been discovered.

In the subject case, the evidence was undisputed that the employer had **established work rules** designed to prevent the violation. After inspection by the CSHO, the safety plan and documentation presented and reviewed were found satisfactory and not subject of citation. The supporting sworn testimony of Mr. Ecott must be given reasonable weight and credibility. It was not impeached. Mr. Ecott testified with regard to the existent safety program and work rules to satisfy the first requirement for the defense of employee misconduct. NVOSHA did not establish preponderance of evidence that respondent failed **to provide the type or amount of sufficient training that a reasonable employer in similar circumstances would have provided to its employees**. *See, El Paso Crane and Rigging CO.,*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993). *Pacific Coast Steel v. State of Nevada, Occupational Safety and Health Administration, Division of Industrial Relations, Department of Business and Industry,* Case A-11-634068-J, Clark County District Court, unpublished.

The employer **adequately communicated** the rules through training of its employees as demonstrated by the documentary evidence and unrebutted sworn testimony of Mr. Ecott. There was no evidence offered or submitted by complainant that the employees were untrained, not given safety instructions, nor instructed in the workplace safety requirements in the company plan. Further the evidence demonstrated the plan and rules had been reviewed by the employees involved in the incident. The unrebutted testimony was the subject employees were also retrained when

rehired. While the bilingual employee supervision, management and oversight were not optimal, there was indeed sufficient testimony and evidence corroborated by the documentation that the respondent employer trained its employees in the safety program and adequately communicated the rules to its employees both verbally and in written English and Spanish.

The employer took **steps to discover violations.** Mr. Ecott testified as to the company disciplinary program for violations and the documentary evidence supported there was indeed a system in place for safety oversight. Mr. Ecott testified that he inspected this site twice daily and at different times. The job site consisted of only eight employees who had been trained in safety, although not working with a foreman. The employees were also instructed by "lead" or fellow employee Kauffman to attach their safety lines on the day of the inspection. The evidence is that they did attach but then later the evidentiary inference reflects they unhooked their lines for no apparent or justifiable reason. The inspection report reflects Mr. Corona informed the CSHO that they had only been on the roof for a few minutes without the attachment. The other statements indicate time frames from 20 minutes to 1 hour. No employer can absolutely assure or police every moment of an employee's work day to guarantee compliance nor is there any OSHA requirement for same. The case law has long recognized the elements of violation through **reasonable prevention and foreseeability.**

The employer **effectively enforced work rules** when violations were discovered. The documents in evidence established the existent company safety plan, the disciplinary action provision, and the "three strikes your out" policy was uncontroverted. Mr. Ecott testified he enforced the disciplinary rules in accordance with the plan. With an eight-man

job site, spot checking by a supervisory employee twice daily at non-defined hours, then issuing first verbal then written warnings and termination, are evidence of effectively enforced work rules. While this portion of respondent's safety program might arguably be minimally sufficient by comparable standards to accomplish the intended result because of rehiring employees who previously violated the safety rules, it is enough under the recognized case law to demonstrate enforcement in accordance with the defense of unpreventable employee misconduct.

> Evidence that the employer effectively communicated enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were **not foreseeable or preventable**. *Austin Bldg. Co. v. Occupational Safety & Health Review Comm.*, 647 F.2d 1063, 1068 (10th Cir. 1981). When an employer proves that it has effectively communicated and enforced its safety policies, serious citations are dismissed. *See Secretary of Labor v. Consolidated Edison Co.*, 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989); *Secretary of Labor v. General Crane Inc.*, 13 O.S.H. Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); *Secretary of Labor v. Greer Architectural Prods. Inc.*, 14 O.S.H. Cas. (BNA) 1200 (OSHRC July 3, 1989). (emphasis added)
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> *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the fountainhead case repeatedly cited to relieve employers responsibility for the allegedly disobedient and negligent act of employees which violate specific standards promulgated under the Act, and sets forth the principal which has been confirmed in an extensive line of OSHC cases and reconfirmed in *Secretary of Labor v. A. Hansen Masonry*, 19 O.S.H.C. 1041, 1042 (2000).
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> An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at

1046.

It is further noted that "employers are not liable under the Act for an individual single act of an employee which an employer cannot prevent." *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.* See also, *Brock v. L.E. Meyers Co.*, 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987).

The controlling cases make clear the existence of an employer's defense for the unforeseeable disobedience of an employee who violates the specific duty clause. However, the disobedience defense will fail if the employer does not effectively communicate and conscientiously enforce the safety program at all times. Even when a safety program is thorough and properly conceived, lax administration renders it ineffective. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110-111 (1st Cir. 1997). Although the mere occurrence of a safety violation does not establish ineffective enforcement, *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000) the employer must show that it took adequate steps to discover violations of its work rules and an effective system to detect unsafe conditions control. *Secretary of Labor v. Fishel Co.*, 18 O.S.H.C. 1530, 1531 (1998). Failure to follow through and to require employees to 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.

Based upon facts, evidence and testimony, it is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1926.501(b)(1) and the proposed penalties are denied.

The Board directs counsel for the **respondent** to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 9th day of September 2013.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

/s/
JOE ADAMS, CHAIRMAN