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NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada, **Complainant,** **vs.** **Apex Linen Service Inc. dba Apex Linen Services, Inc.,** **Respondent.**	**Docket No. LV 19-1961** **Inspection No. 1320954**

DECISION OF THE BOARD

This matter initially came on for hearing before the Nevada Occupational Safety and Health Review Board on March 13 and March 14, 2019, in furtherance of a Notice duly provided according to law. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations (the State or OSHA). Representing the respondent, Apex Linen Service Inc. dba Apex Linen Services, Inc., was John Naylor, Esq., Naylor & Braster (the company or Apex). Board of Review members in attendance for the hearing were Chairman, Pro-tem, Rodd Weber, Sandra Roche, James Halsey and Frank Milligan. There being four members of the Board present to hear this matter with at least one member representing Management and one member representing Labor in attendance, a quorum was present to hear the matter and conduct the business of the Board.

The evidentiary portion of these proceedings was concluded on March 13, 2019. The Board commenced deliberations on March 14, 2019 with the same Board members present at that time. The Board found consensus during the deliberations on March 14, 2019 with respect to Citation 1, Item 1, but was unable to reach a conclusion regarding Citation 1, Item 2, the remaining citation in this matter.

The Board deadlocked on Citation 1, Item 2, with a vote of 2 in favor and 2 against the dismissal of Citation 1, Item 2. The Board next voted to continue deliberations on this case while research was conducted on the significance of a deadlocked vote.

The Board picked up the deliberations of this matter on May 9, 2019. At that time, the original four members that heard this matter were in attendance for the hearing. In addition, Chairman Steve Ingersoll joined the meeting. As he had before him the entire record in this case as well as the transcript of the evidentiary hearing, Chairman Ingersoll was eligible to participate in the deliberations resulting in a final disposition of this matter. As an uneven number of Board members (five members being present and eligible to vote) were to convene on the disposition of this matter, a final decision was assured as to all claims or counts as further elucidated below.

Jurisdiction is not disputed and is conferred in accordance with NRS 618.315 and, Nevada has adopted all Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked and any amendments thereto and shall be deemed Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).

The State's complaint sets forth the allegations of the two citations the State claims constitute violations of the Nevada Revised Statutes and Regulations. At the outset of the hearing, the State offered for admission into evidence Exhibits 1 through 3, consisting of pages 1 through 183. Mr. Naylor, for Apex, objected to the admissibility of pages 6 through 10 and 19 through 42. *See,* 1 Tr., p. 11. Chairman Weber overruled the objection and the entirety of the State's Exhibits 1 through 3, consisting of pages 1 through 183, were admitted into evidence. Apex offered no exhibits for admission into evidence at the outset of the hearing. During the course of the hearing, however, Apex offered Exhibits A through C into evidence. *See,* 1Tr., pp. 152, 153. Apex then withdrew the offer of Exhibit A into evidence. The State

objected to Exhibit B being admitted into evidence. The Chairman overruled the State's objection. Exhibit A was withdrawn by Apex and Exhibits B and C were admitted into evidence. *See,* 1Tr., p. 166;2-5. Briefly, Apex is a laundry serving the hospitality business of the Las Vegas Metropolitan area. 1 Tr., p. 141. During week days and off season, Apex launders 20,000 pounds of sheets and towels a day. During the high season, it launders 220,000 pounds of sheets, pillow cases and towels a day. *See,* 1Tr., p. 141. It also dry cleans uniforms. Exhibit 1, p. 4, 1 Tr., p. 141. Apex operates out of a 100,000 square foot building, half of which is devoted to production and the other half to dry cleaning. *See,* 1Tr., p. 141. The roof of the building where the violations allegedly occurred is 29 feet above ground level. Exhibit 1, p. 15, 1Tr., pp. 141, 142. The roof is dotted with 39 skylights, 1 Tr., p. 142, with no intervening flooring between the roof and the concrete floor of the building. A fall through the skylight would result in a 29 foot drop to the floor. *See,* 1Tr., p. 142. Access to the roof where the alleged incidents took place is by hatches located at Bay 5 and Bay 8. *See,* 1Tr., p. 27;10-12, Exhibit 1, pp. 14-17.

In this case, Apex deployed three employees classified as engineers to refurbish swamp coolers located on the Apex plant's roof, built with unsupported sides and edges and dimpled with the 39 skylights, situated 29 feet above the floor and adjacent ground. *See,* Exhibit 1, pp. 14-17. The State alleges Apex had consigned the employees to unsafe conditions without adequate personal fall protection equipment either at the sides and edges of the roof or around the skylights. Apex disagrees and avers affirmatively, that the skylights were, themselves, so sturdy that no guardrail system or other safety measures were needed and, therefore, no violations occurred as these three employees were working in safe conditions.

While no employee was injured, the State charged Apex in Citation 1, Item 1, for a violation of 29 CFR § 1910.28(b)(1)(i), which provides:

> (i) Unprotected sides and edges. Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level is protected from falling by one or more of the following:

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(A) Guardrail systems;
(B) Safety net systems; or
(C) Personal fall protection systems, such as personal fall arrest, travel restraint, or positioning systems.

The violation was listed as serious.

The State also charged Apex in Citation 1, Item 2, for a violation of 29 CFR § 1910.28(b)(3)(i) which provides:

Holes. The employer must ensure:

(i) Each employee is protected from falling through any hole (including skylights) that is 4 feet (1.2 m) or more above a lower level by one or more of the following:

(A) Covers;
(B) Guardrail systems;
(C) Travel restraint systems; or
(D) Personal fall arrest systems.

See, Complaint pp. 2 and 3.

Pursuant to NAC 618.788, the burden throughout is upon the Chief or Complainant to prove the two citations. This requires proof of a *prima facie* case which entails a showing of: (1) the applicability of the OSHA Regulation to the matter at hand; (2) noncompliance with the OSHA Regulation; (3) employee exposure to the hazardous condition, the subject of the OSHA Regulation; and (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original Roofing Co., LLC v. Chief Administrative Officer of the Occupational Safety and Health Administration,* 135 Nev.Adv.Op. 18, 442 P.3d. 146, 149 (2019).

The Board of Review concludes that the State has met this burden in the prosecution of this matter for each of the two citations being brought in this case.

STATEMENT OF FACTS

Apex, through Keith Marsh, the Director of Engineering, Exhibit 1, p. 3, consigned three of its employees, classified as engineers, to the roof top of its plant, to refurbish the air conditioners (swamp coolers) located there. The building was a 100,000 square foot structure, 1Tr., p. 141, and thus, presumably, the roof top occupied the same square footage. The exact

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number of swamp coolers is unknown, save and except, aerial photos of the roof top reveal there were multiple. Exhibit 1, pp. 84-93.

Also, the roof top was sprinkled with multiple skylights, mixed in with the swamp coolers under repair as the photos also reveal. *Ibid.* There were 39 skylights, in all, on the roof, 1Tr., pp. 138, 142, 185, around which the three engineers, Joseph Servin, Adam Arellano, and Charles Walker, had to negotiate to access the roof and the swamp coolers. The skylights contained a warning, stating as follows:

> This skylight is designed to withstand normal elements of the weather. It is not designed to withstand human impact or falling objects. The skylight should not be walked upon any circumstances. The owner or designer should restrict access only to authorized personnel who have been adequately cautioned as to the location of the skylights and informed of the warnings above, or said owner should provide protective guardrails or screens around the skylights. *See*, Exhibit 3, p. 170.

This matter was investigated by Michael Rodrigues, a State Safety Inspector, Exhibit 1, pp. 14-17. The investigation was initiated by a complaint received by State OSHA. *See*, Exhibit 1, p. 4. He arrived on the scene on June 6, 2018, Exhibit 1, p. 14-17, inspected the premises, met with Marty Martin, the Chief Operating Officer, Exhibit 1, p. 3, and Keith Marsh, Exhibit 1, pp. 14-17, the Director of Engineering and Jack of all trades. 1Tr., 135. Mr. Rodrigues conducted interviews that date concerning the complaint, and continued the investigation, afterwards as well. Exhibit 1, pp. 14-17, 1 Tr., p. 28.

Apex is a Nevada domestic corporation. Exhibit 1, p. 1. It is duly organized and incorporated under the laws of the State of Nevada, with a principle place of business in Las Vegas, NV. Exhibit 1, p. 1.

The roof top was noteworthy for its open sides and edges. There was a parapet wall of sorts at the perimeter, *see*, photos, Exhibit 1, pp. 84-93, that ranged in height from ankle high, 1Tr., p. 103, to 34, inches high. *See*, photo, Exhibit 87. *See also*, 1 Tr., pp. 29, 98, 102. Access to the roof to refurbish the swamp coolers was by two hatches at Bay 5 and Bay 8, according to the three employees and Mr. Marsh. 1Tr., pp. 27, 90, 103, 119, 120. The employees had to climb a rung ladder inside the building to gain access to the roof top, through hatch cover holes in the roof at Bay 5 and Bay 8. 1Tr., pp. 19, 20, 27. The hatch opened to the roof, at the roof's edge.

1Tr., pp. 29, 90, 102, 107, Exhibit 1, p. 88. There was no guardrail or any other kind of safety measure at the hatch to prevent the employees from going over the side of the roof. Exhibit 1, pp. 14-17, 84a, 85a, 87, 88, 1 Tr., pp. 139, 140.

Equipment and material were needed to refurbish the swamp coolers. The rung ladder was apparently too cumbersome to transport tools and supplies to the roof top. 1 Tr., p. 22. Another means was required. Apex chose to have tools and supplies brought to the roof top using a five gallon milk crate attached to a rope, tossed over the side of the roof to the ground. The five gallon crate was loaded and then, the engineers would, peering over the side of the roof, pull on the rope to lift the crate with tools and supplies to the roof top, for the engineers to perform their work. No personal protective fall equipment was provided to the employees while they hauled their tools and supplies to the roof top. This exercise was repeated around five times, daily. Actually, no personal fall protective equipment was provided to the three employees working the roof, at any time prior to Mr. Rodrigues' investigation commencing June 6, 2018. 1Tr., pp. 139, 140. They were working there under these conditions, for a full three months as of June 6, 2018, when State OSHA arrived on the scene. 1Tr., pp. 21, 22, 26 (6-7 times a day), 27, 28, 30, 91, 92, 101, 139, 140. *See also*, Exhibit pp. 90, 92 (photos of site used to hoist supplies).

The water jug was purchased by Mr. Marsh and he also supplied the rope used to haul the tools and materials roof top. 1Tr., pp. 146, 147. He, himself, accessed the roof through the hatches at Bays 5 and 8. 1Tr., p. 180. He also used the milk crate and rope system, himself, to haul equipment to the roof for use by the three employees he had assigned to this duty. 1Tr., pp. 21, 139, 140, 167, 168, 180. Having accessed the roof top, himself, and used and supplied the rope and milk crate system to get tools and equipment to the roof, he had actual knowledge of the working conditions for the three engineers on the roof top. 1Tr., pp. 146, 147, 167, 168, 180. As a member of management, therefore, management at Apex had knowledge of these working conditions.

Mr. Marsh knew of the warning on the skylights, as he had read it. 1Tr., pp. 22, 138. He never acted upon it as none of the three employees working the roof knew of the language of the warning on the skylights. Also, there were no guardrails placed around the skylights or any other

protective measures taken by Apex to keep the roof top employees from falling through the skylights. Employees were left to their own devices when working around and/or walking by the skylights. 1Tr., pp. 178, 179.

Apex had, however, a fall protection plan. 1Tr., pp. 21, 38, 179. Mr. Marsh was the responsible party for the fall protection plan. 1Tr., pp. 21, 38. There was no discernible evidence produced by Apex that the three employees were given training on it before June 6, 2018. 1Tr., pp. 139, 140, 178, 179. At the hearing, Apex produced Exhibit C, admitted into evidence, a sign up sheet showing as evidence that Adam Arellano had received roof top safety and fall protection training. The training is dated August 1, 2018, or after the fact of the three months employees worked the roof, without training. And, again, no personal fall protective equipment was provided to the employees, even though they were working on a roof top with open sides and edges, were working around unguarded skylights, and were expected to haul their tools and equipment up to the roof, while standing at the very edge of an unguarded roof, where, if they fell, they would have landed 29 feet below to certain, serious injury, if not death.

Then, a fall through a skylight, if incapable of withstanding the force of a human being falling upon or walking on a skylight, would have also resulted in a fall of 29 feet to the floor below and resulted in certain severe injury, if not death. That the consequences of a 29 foot fall were severe injury, if not death, were never contested.

During the course of the investigation, Keith Marsh secured and produced to State OSHA, the results of tests to measure the strength of skylights to withstand static and impact loads. One set of tests was completed on December 20, 2013, and reported on December 31, 2013. The other tests were conducted on February 12 and 25, 2010, and reported on March 1, 2010. *See*, Apex Exhibit B, pp. 50-52 and 58-60, admitted into evidence. There was no explanation provided for the gap between page 52 and page 58.

The test results, themselves, were positive. For the test results reported December 31, 2013, static loads of 200 and 400 pounds produced no cracks or openings. For impact loads of 200 and 400 pounds, at a drop of 24 inches and 36 inches, there were no cracks or openings. Exhibit B, p. 52. For the test results reported March 1, 2010, the testing began at 400 pounds.

The only cracking or partial disintegration began at 1,600 pounds.

According to frequently asked questions (FAQ) prepared by Bristolite, a skylight manufacturer, Exhibit 2, p. 140, the Federal OSHA standard for Walking-Working Surfaces; Guarding Floor and Wall Openings, Federal OSHA at 29 CFR § 1910.23(e)(8), provides: "Skylight screens shall be of such construction and mounting that they are capable of withstanding at least 200 pounds applied perpendicularly at any one area on the screen. They shall also be of a ... and mounting that under ordinary loads or impacts, they will not deflect downward sufficiently to ... below them...." Exhibit 2, p. 149 admitted into evidence.

Then, as to the life of a skylight, in another FAQ, Bristolite answered: "[The life of a skylight]... varies widely. It depends primarily on the quality of materials used in the design and ... skylights." Exhibit 2, p. 144. The gaps in these FAQs appear in the documents as submitted by the parties and admitted into evidence. For this FAQ, it is clear, the life of a skylight varies and is a function of the quality of the materials.

Apex also offered in defense, a letter of interpretation from John B. Miles, then Director, Directorate of Field Operations, dated February 16, 1984, addressing skylights. Exhibit 2, pp., 151-152. There, Mr. Miles opined that skylights are to be regarded as a hatchway and, thus, an opening in a roof through which a person might fall. He then opined:

> When a skylight screen is selected for safeguarding the opening, and in the event the skylight is constructed of plastic material subject to fracture (as glass would be), then the skylight must at a minimum be provided with a skylight screen capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen. On the other hand, a plastic skylight which can provide the necessary structural integrity to support the 200 pound load would not be required to be further safeguarded, since it would meet the intended function of a screen as well. Exhibit 2, pp. 151-152.

In other words, if a skylight is made out of plastic which can withstand a 200 pound load, it may stand alone as a secure hole in the roof. No other safety measures are needed to guard against an employee falling into this hole, known as a skylight, according to the Miles letter of interpretation.

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DISCUSSION

Based upon these facts, the State has proven a *prima facie* case for 29 CFR § 1910.28(b)(1)(i). It cannot be realistically challenged that if this citation is sustained, it would be sustained as a serious violation. A fall from 29 feet to a concrete surface, below, could only result in serious injury, if not death. And, the serious label was never challenged for this citation by Apex.

The regulation, also, applies. By its terms, it is intended to protect employees who are working on a surface with unprotected sides and edges. The testimony of Servin, Arellano and Walker, plus the photos reveal that the walking and working surface was unprotected at the sides and edges. Also, the hatch through which the engineers accessed the roof was immediately adjacent to unprotected edges at Bays 5 and 8. These are the circumstances that 29 CFR § 1910.28(b)(1)(i) on its face addresses.

The three engineers were also working in zone of danger. First, they were on a roof top with exposed and unprotected sides and edges. The parapet wall, to the extent it existed, ranged in height from ankle height to 34 inches, which is to say, it protected very little for the engineers working roof top. Worse, they were working there, without a guardrail system, a safety net system, or any personal fall protection systems such as a personal fall arrest system, travel restraint or a positioning system. In a word, while working around unprotected sides and edges, hoisting tools and supplies by a rope and carton, while looking over the side of the building down 29 feet below, they were at risk, and without protection. They were the intended beneficiaries of 29 CFR § 1910.28(b)(1)(i).

Furthermore, though not cited for this regulation, 29 CFR§1910.22, "General requirements" provides that "[t]he employer must provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces." And, employers also, "...must ensure that each walking-working surface can support the maximum intended load for that surface." *See*, 29 CFR § 1910.22(c). These regulations should heighten an employer's awareness of the gravity of working at heights by the comprehensive nature of the protections afforded.

Knowledge of the aberrant and perilous working conditions is also established. Keith Marsh, the Director of Engineering for Apex, assigned Servin, Arellano, and Walker to the roof top duty. He also bought the water jug and supplied the milk crates for Servin, Arellano and Walker used to haul tools and equipment to the roof top. He also supplied the rope to haul up the milk container. Mr. Marsh, as the Director of Engineering, had to be a part of management. He was also an employer representative during the initial consultation with Rodrigues at the outset of the investigation. Exhibit, pp. 14-17. He also hauled equipment up to the roof using the rope and carton system he supplied. 1Tr., p. 180. To do so, he accessed the roof through the unguarded hatch opening to the roof.

He clearly had actual knowledge of the working conditions on the roof top. As a manager for Apex, with actual knowledge of the working conditions, employer knowledge is established. Moreover, Apex had a safety program of its own. Apex ignored it. 1Tr., p. 139. Mr. Marsh was responsible for the implementation of the safety program. The employer had to know, therefore, that concerns about safety measures would attend working at heights around unguarded and exposed sides and edges. If Mr. Marsh was not a member of management, under these circumstances, his knowledge of working conditions may be imputed to Apex, the employer. *See, Original Roofing, supra* at 149. Moreover, it is also true, a failure of an employer to observe, as here, its own workplace safety program, is evidence of a failure to provide a safe work and workplace environment. *See, Northwest Psychiatric Hospital*, 2020 OSHD, ¶ 33,778, decided March 3, 2020, U.S. Court of Appeals, District of Columbia Circuit, No. 19-1089.

Knowledge of the employer, Apex, is further established through Marty Martin, Apex's Chief Operating Officer. He accessed the roof, himself, by using the access hatch openings at bays 5 and 8, also. 1Tr., p. 20. Mr. Martin also had three years experience as a roof inspector and held an OSHA 30-hour card. He admittedly was aware of the large number of skylights on the roof. Tr., 17, 19. The 30-hour OSHA card was significant because it meant that Mr. Martin attended training including fall protection and hazard awareness. 1Tr., p. 120. Combined with the three years of roof inspections and actual access to the roof top, Mr. Martin must have been fully cognizant of the working conditions roof top, to which Severin, Arellano and Walker were

subjected.

In sum, the overwhelming body of evidence shows a violation of 29 CFR § 1910.28(b)(1)(i). Apex did not seriously challenge this citation. The Board, accordingly, concludes that the State also established the classification as severe, the probability of a repeat offense, the gravity of the offense and the extent of the violation. These employees were at serious risk, working totally unprotected at 29 feet. A fine of $7,000 without deduction is appropriate.

Turning to the skylight citation, 29 CFR § 1910.28(b)(3)(i), it is beyond dispute, the skylights were everywhere on the roof top, 39 in all to be exact. *See*, Exhibit 1, pp., 84-93, the roof top photographs. It would be impossible not to be in the vicinity of the skylights, when refurbishing the swamp coolers, ingressing and egressing the roof and hoisting tools and supplies from the ground. 1Tr., p. 27.

It is beyond dispute, also, that Apex provided no covers to the skylights, guardrail systems, travel restraint systems or personal fall arrest systems, because Apex provided no fall protection at all to Servin, Arellano, and Walker. 1 Tr., p. 140. Worse, Mr. Walker was left to work alone on the roof in the evening. 1Tr., pp. 31, 59. If something happened to him, who knows how long it would have taken to discover that he was injured.

Mr. Marsh, however, the person who made the roof top assignment, was aware of the gravity of the situation. He had read the ominous warning placed on the side of the skylights quoted, above. *See also,* Exhibit 3, p.170, a photograph of the skylight on the roof of the building. He also claimed to have an OSHA 30 card and should have been aware of the perils of working at heights of 29 feet from a concrete floor. Moreover, the training topics of an Apex training sign up sheet entitled, "Roof top safety and Fall Protection" included the nature of fall hazards, procedures to minimize hazards and the correct use of fall systems and equipment. Apex's Exhibit C. This shows further awareness by Apex of the perils of working at heights in roof tops and around skylights. Nevertheless, management, through Mr. Marsh, imposed no restriction on access to the roof and Servin, Arellano and Walker were not warned of the perils of working around the skylights. 1Tr., pp., 139, 178, 179.

Apex's position, here, is that this does not matter. There is no violation, because Apex argues, the skylight requires no caution or protection as the skylights are strong enough to withstand the minimum standards, on their own, set by OSHA. 1Tr., pp. 75-80, 124. *See*, 29 CFR § 1910.23(a)(4) which provides: "Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides." *See also*, 29 CFR § 1910.23(e)(8), which provides: "Skylight screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen."

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Apex points to the two tests it cited to the Board as proof that the Apex skylights can withstand a 200 pound load applied perpendicularly at any one area of the skylight. Apex Exhibit B, pp. 50-52, 58-60. Apex then points to the Miles letter of interpretation when Mr. Miles opined that no screening or other protection around the skylight is required if the skylight is made out of plastic and is "...capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen (skylight)." Exhibit 2, p. 151. Taking these tests and Miles' letter of interpretation in concert, the fact that there was no screening, guard rails, or other form of protection for working around these skylights is of no moment as none is required. Therefore, there is no violation of 29 CFR § 1910.23(b)(3)(i). Thus, Apex claims this citation should be dismissed because State OSHA did not prove that the skylights were unable to withstand the 200 pound load identified in Miles' letter of interpretation. 1Tr., pp. 75-80, 124.

Therein lies the rub in this case. Is the burden on the State to show not only that safety precautions were not taken in relation to the skylights, but also, that the skylights were unsafe because they could not withstand the 200 pound load? Or, is the burden upon Apex to prove that the safety precautions were unnecessary because the skylights could withstand the 200 pound load, rendering the safety measures moot? The State clearly did not attempt to prove the skylights could not withstand a 200 pound load. Is this failure, then, fatal to the State's press of Citation 1, Item 2?

The answer lies in the Nevada Rules of Civil Procedure which apply to proceedings

before the Board, unless expressly indicated otherwise. *See*, NAC 618.680(2). More particularly, the answer lies in Rule 8(c), NRCP, governing affirmative defenses. To defend on the basis of Miles' letter of interpretation, Apex must do more than simply deny that it violated 29 CFR § 1910.23(b)(3)(i) in order to escape liability. A simple denial of liability could be based upon any number of reasons and, therefore, Apex would have to affirmatively establish the relevance of the Miles' letter of interpretation and how it would operate in concert with the load testing results to avoid being found guilty of the skylight citation. *See*, *Sejour v. Steven Davis Farms, LLC*, 28 F.Supp.3d 1216, 1224 (N.D. Fla. 2014); *Will v. Richardson-Merrell, Inc.*, 647 F.Supp. 544, 547 (S.D. Ga. 1986).

The Board, therefore, holds that proof that the skylights can withstand the 200 pound load so that in concert with the Miles' letter of interpretation, there is no violation for failing to implement safety measures constitutes an affirmative defense. The burden of proof is, therefore, upon Apex, to prove that the Apex skylights were capable of withstanding the 200 pound load factor. *See, Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶ 23,664, p. 28,694 (1979); *Sanderson Farms Inc., v. OSHRC*, 348 Fed.Appx. 53, 57 (5th Cir., 2009)(once a *prima facie* case is shown, it is then incumbent upon the employer to prove its affirmative defenses, if any.).

Apex failed in its burden. Apex provided no proof that the skylights on the roof top of its facility could withstand the 200 pound load standard because Apex introduced no evidence to show that the skylights the subject of the testing were comparable in age or composition to those on the roof top at Apex. Similarly, there was no evidence introduced to show that the skylights the subject of the testing were exposed to the same range of heat, wind, rain or cold to which the Apex skylights are exposed in Las Vegas. Similarly, no evidence was introduced that the Apex skylights were comparable in quality to those the subject of the testing. 1Tr., pp. 162, 168-171. If anything, the comparison amounted to proverbial apples to oranges. The Board accordingly finds that the test results do not show that the Apex skylights can withstand a 200 pound load, and that, therefore, Apex has failed to prove its affirmative defense to Citation 1, Item 2. That is to say, Apex provided no information from which could be drawn a reasonable inference that the skylights tested were the same or reasonably the same as Apex's skylights so that it could be

determined fairly and reasonably that Apex's skylights could perform as well as the skylights that were tested.

The Board also finds, based upon the same reasoning applicable to Citation 1, Item 1, that the classification as serious is correct. The element in the *prima facies* case of knowledge is established and for the same rational set out for Citation 1, Item 1, 29 CFR § 1910.23(b)(1)(i), is an appropriate regulation to be applied, here. The evidence reveals that the engineers were working in the zone of danger around the skylights, there was non-compliance upon a failure of Apex to prove the skylights could withstand a 200 pound load factor, and there was actual and constructive knowledge of the working conditions on the roof top, which could, under the circumstances, be imputed to management. *See, Original Roofing, supra*, at 149. And, the fact that no one fell through the skylights does not foreclose a finding upholding Citation 1, Item 2. *See, Brennan v. Occupational Safety & Health Review Comm'n.*, 513 F.2d 1032, 1039 (2nd Cir., 1975 (need not prove teetering on the edge of an unguarded floor).

CONCLUSIONS OF LAW

Based upon the foregoing, the Board finds and concludes that Citation 1, Item 1 is sustained, including the classification of severe requiring the payment of a fine in the amount of $7,000.00; and

Based upon the foregoing, the Board finds and concludes that Citation 1, Item 2 is also sustained, including the classification of severe requiring the payment of a fine in the amount of $7,000.00.

The Board conducted deliberations on March 14, 2019, where it reached a consensus that Citation 1, Item 1 had been proven. It was, therefore, moved by Frank Milligan, seconded by Sandra Roche, to affirm, Citation 1, Item 1. Motion adopted. Vote: 4-0. The Board could not agree on Citation 1, Item 2, when a motion to reject Citation 1, Item 2 failed on a vote of 2 in favor and 2 against, with one Board member being absent. The matter was continued for further deliberations.

The matter was taken up again on May 9, 2019. All five Board members participated, thereby avoiding the prospects of a tie vote as Chairman Ingersoll had reviewed the entire file

and transcripts of the previous proceedings and was, therefore, eligible to participate in the disposition of this matter. *See*, NRS 233B.124.

Citation 1, Item 2, was considered. It was then moved by James Halsey, seconded by Rodd Weber, to affirm Citation 1, Item 2. Motion adopted. Vote: 4-1 (Roche dissenting).

The Board ordered that counsel for the complainant submit proposed Findings of Fact and Conclusion of Law to the Nevada Occupational Safety and Health Review Board consistent with this Decision and serve copies on opposing counsel within 20 days from the date of this decision. After five days time for filing any objections, 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.

On August 27, 2020, the Board convened to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board.

Those present and eligible to vote on this question consisted of four of the five current members of the Board, to-wit, Chairman Steve Ingersoll, Board Secretary Rodd Weber, members James Halsey and Frank Milligan. Upon a motion by Rodd Weber, seconded by James Halsey, the Board voted 4-0-1 (Semenko abstaining), to approve this Decision of the Board as the action of the Board and to authorize the Chairman, Steve Ingersoll, after any grammatical or typographical errors are corrected, to execute, without further Board review, this Decision on behalf of the Nevada Occupational Safety and Health Review Board.

On August 27, 2020, this Decision is, therefore, hereby adopted and approved as the Decision of the Board of Review.

Dated this 17th day of September, 2020.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: /s/ Steve Ingersoll
Steve Ingersoll, Chairman

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Decision of the Board*, on those parties identified below by e-mailing and placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

Salli Ortiz, Esq.
DIR Legal
400 West King Street, Suite 201
Carson City, NV 89703

John M. Naylor, Esq.
Naylor & Braster
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145

Dated this 17th day of September, 2020.

Employee of
The Law Offices of Charles R. Zeh, Esq.

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THE LAW OFFICES OF CHARLES R. ZEH, ESQ.
50 West Liberty Street, Suite 950
Reno, Nevada 89501
(775) 323-5700 FAX: (775) 786-8183

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, STATE OF NEVADA, **Complainant,** **vs.** **APEX LINEN SERVICE, INC. DBA APEX LINEN SERVICES, INC.,** **Respondent.**	**Docket No. LV 19-1961** **Inspection No. 1320954**

FILED
DEC 05 2023
OSHA REVIEW BOARD
BY

ORDER FILING FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

The above captioned matter came on for hearing before the Nevada Occupational Safety and Health Review Board on November 8, 2023, for the Board to consider whether the proposed Findings of Fact, Conclusions of Law and Final Order prepared by the State of Nevada were consistent with the Board's decision in this matter dated September 20, 2020. No challenge to the proposed Findings of Fact, Conclusions of Law and Final Order, (FOF) was levied by Respondent against the FOF proposed by the State. The parties were duly noticed for this hearing.

GOOD CAUSE APPEARING, the Board HEREBY FINDS that the proposed Findings of Fact, Conclusions of Law and Final Order, attached hereto as Exhibit A, are consistent with the Board's Decision in this case dated September 20, 2020, and HEREBY ORDERS that said Findings of Fact, Conclusions of Law and Final Order are the Findings of Fact, Conclusions of Law and Final Order of the Board, effective this date for this matter.

IT IS SO ORDERED

Dated this 30th day of November, 2023.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: */s/Rodd Weber*
Rodd Weber, Chairman

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Order Filing Findings of Fact, Conclusions of Law and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail, return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada to the following addresses:

Salli Ortiz, Division Counsel
Division of Industrial Relations
1886 East College Pkwy., Ste. #110
Carson City, NV 89706

Jeffrey Golden, Esq.
Golden Goodrich
650 Town Center Drive, Suite 600
Costa Mesa, CA 92626

Dated this 5th day of December, 2023.

Karen Kennedy
Employee of
The Law Offices of Charles R. Zeh, Esq.

S:\Clients\OSHA\LV 19-1961, Apex Linen Service\Order Filing FOF.wpd

Exhibit A

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

vs.

APEX LINEN SERVICE, INC. dba APEX LINEN SERVICES, INC.,
Respondent.

DOCKET NO: LV 19-1961

Inspection No: 1320954

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came before the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD ("Review Board") for a hearing on March 13 and March 14, 2019. The Review Board has jurisdiction to hear such matters pursuant to Nevada Revised Statutes §618.315. The hearing was conducted pursuant to Chapter 618 and 233B of the Nevada Revised Statutes.

Complainant, the Chief Administrative Officer of the Nevada Occupational Safety and Health Administration, Division of Industrial Relations ("NV OSHA"), was represented by Salli Ortiz, Esq., Division Counsel, Division of Industrial Relations of the Nevada Department of Business and Industry. Respondent, APEX LINEN SERVICE, INC. dba APEX LINEN SERVICES, INC. ("APEX LINEN") was represented by John Naylor, Esq., from Naylor & Braster.

At the hearing, the parties stipulated to the admission of NV OSHA's Ex.s 1 through 3, with the exceptions of pages 6-10 and 19-42. 1 TR 10:3-12. The Review Board nonetheless admitted those pages. 1 TR 10:25 through 11:9. The parties also stipulated to the admission of APEX LINEN's Ex. C, as well as Ex. B, with the exception of pages 58-60.

1 Tr. 151:13 through 152:15; 1 TR 159:3-15. The Review Board nonetheless admitted those pages. 1 TR 160:7-9.

NV OSHA presented the testimony of the Compliance Safety and Health Officer ("CSHO") that conducted the inspection, Michael Rodrigues ("CSHO Rodrigues"), CSHO Rodrigues' Supervisor, Jamal Sayegh ("Supervisor Sayegh"), former APEX LINEN engineer Joseph Servin ("Engineer Servin"), former APEX LINEN engineer Adam Arellano ("Engineer Arellano"), and APEX LINEN Director of Engineering, Keith Marsh ("Eng. Dir. Marsh").

The Review Board, having heard testimony, admitted documentary evidence in this matter, considered the parties' respective arguments, and being fully advised regarding the underlying subject matter, renders the following Findings of Fact, Conclusions of Law, and Final Order:

PRELIMINARY FINDINGS

1. At all times mentioned, the Complainant served as the Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations, Department of Business and Industry, which is the agency of the State of Nevada responsible for the administration of Occupational Safety and Health.

2. Respondent APEX LINEN is a Nevada domestic corporation, with a business and mailing address at 6375 South Arville Street, Las Vegas, Nevada 89118.

3. Pursuant to NRS 618.315, jurisdiction has been conferred upon NV OSHA over the working conditions at APEX LINEN's job site at 6375 South Arville Street, Las Vegas, Nevada 89118.

4. On June 1, 2018, NV OSHA received a Complaint alleging a fall protection hazard. Ex. 1, pg. 4.

5. CSHO Rodrigues was the NV OSHA inspector who conducted the inspection. Ex. 1, pgs. 5, 14-16.

6. Supervisor Sayegh was identified as the NV OSHA supervisor who reviewed the evidence, citation process and the responsible complainant witness to support the violations.

7. On June 6, 2018, CSHO Gillings conducted an Opening Conference with APEX LINEN's Chief Operating Officer Marty Martin ("COO Martin") and Eng. Dir. Marsh. Ex. 1, pg. 5; *see* Ex. 1, pg. 14.

8. On August 8, 2018, NV OSHA issued a Citation and Notification of Penalty ("Citation"), Inspection Number 1320954, to APEX LINEN for a "Serious" violation of 29 CFR 1910.28(b)(1)(i) (unprotected sides and edges), and 29 CFR 1910.28(b)(3)(i) (Holes). Ex. 1, pg. 56.

9. By contest letter dated August 12, 2018, APEX LINEN contested the citation items and penalties set forth in the Citation, resulting from Inspection Number 1320954. Ex. 1, pg. 69.

10. On September 17, 2018, NV OSHA filed a Complaint with the Review Board alleging the code violations. Ex. 1, pg. 72. The alleged violations are as follows:

> **Citation 1, Item 1: SERIOUS**
>
> **29 CFR 1910.28(b)(1)(i):** Unprotected sides and edges. Except as provided elsewhere in this section, the employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet (1.2 m) or more above a lower level is protected from falling by one or more of the following: guardrail systems; safety net systems; or personal fall protection systems, such as personal fall arrest, travel restrain, or positioning systems.
>
> On June 7, 2018, on the rooftop of the Apex Linen Services, Inc. facility, located at 6375 South Arville Street, Las Vegas, NV 89118, three employees performed tasks associated with the maintenance of swamp coolers. The employees worked at heights of approximately 29 feet to a concrete surface below, and were not protected from falling by either guardrail systems, safety net systems, or personal fall protection systems, such as personal fall arrest, travel restraint, or positioning systems. Exposure to the fall hazard could result in serious injuries such as broken bones, head and spinal injuries, up to and including death.

The following are four instances in which employees were exposed to a fall hazard:

Instance 1 – Employees accessed the rooftop by way of fixed ladder with an access hatch located at bay #5. At the top of the access hatch, the employees were exposed to a fall hazard of approximately 29 feet to the concrete surface below.

Instance 2 – Employees accessed the rooftop by way of fixed ladder with an access hatch located at bay #5. At the top of the access hatch, the employees were exposed to a fall hazard of approximately 29 feet to the concrete surface below.

Instance 3 – Employees manually hoisted items such as tools and equipment along the roof edge, east of the access hatch located at bay #5, which exposed them to a fall hazard of approximately 29 feet to the concrete surface below.

Instance 4 - Employees manually hoisted items such as tools and equipment along the roof edge, east of the access hatch located at bay #5, which exposed them to a fall hazard of approximately 29 feet to the concrete surface below.

The Serious citation item had a proposed penalty of seven thousand dollars ($7,000).

Citation 1, Item 2: SERIOUS

29 CFR 1910.28(b)(3)(i): (3) Holes. The employer must ensure: (i) Each employee is protected from falling through any hole (including skylights) that is 4 feet (1.2 m) or more above a lower level by one or more of the following: covers; guardrail systems; travel restraint systems; or personal fall arrest systems.

On June 7, 2018, on the rooftop of the Apex Linen Services, Inc. facility, located at 6375 South Arville Street, Las Vegas, NV 89118, two employees performed tasks associated with the maintenance of an evaporative (swamp) cooler B13. This required them to work in an area where a skylight was located. The fall distance to the lower level was approximately 29 feet. The employees were not protected from falling through the skylight by either covers, guardrail systems, travel restraint systems, or personal fall arrest systems. Exposure to the fall hazard could result in serious injuries such as broken bones, head and spinal injuries, up to and including death.

The Serious citation item had a proposed penalty of seven thousand dollars ($7,000).

///

FINDINGS OF FACT

1. NV OSHA conducted a complaint inspection on June 6, 2018, based on a complaint that was submitted to it, reporting fall protection hazards at Respondent's worksite. Ex. 1, pgs. 4-5, and 14-18.

2. The inspection was designated as Inspection No. 1320954. Ex. 1, pg. 11.

3. The Apex Linen Services, Inc. site was located at 6375 Arville Street, Suite 10. Ex. 1, pg. 2, 5.

4. Eng. Dir. Marsh assigned three of its employees, classified as engineers, to the rooftop of its plant to refurbish the air conditioners (swamp coolers) located there. Ex. 1, pg. 15.

5. The building was a 100,000 square foot structure, and presumably the rooftop occupied the same square footage. 1 Tr. 141:17-20.

6. The exact number of swamp coolers is unknown, save and except, aerial photos of the roof top reveal there were multiple. Ex. 1, pgs. 84-93.

7. The rooftop was also sprinkled with multiple skylights, mixed in with the swamp coolers under repair, as the photos also reveal. Ex. 1, pgs. 84-93.

8. There were 39 skylights in all on the roof, around which the three engineers, Engineer Servin, Engineer Arellano, and Charles Walker ("Engineer Walker"), had to negotiate to access the roof and the swamp coolers. 1 Tr. 138:4-6; 142:5-7.

9. The skylights contained a warning, stating as follows: "This skylight is designed to withstand normal elements of weather. It is not designed to withstand human impact or falling objects. The skylight should not be walked upon under any circumstances. The owner or designer should restrict access only to authorized personnel who have been adequately cautioned as to the location of the skylights and informed of the warnings above, or said owner should provide protective guardrails or screens around the skylights." Ex. 3, pg. 170.

10. The investigation was initiated by a complaint received by NV OSHA, which was investigated by CSHO Rodrigues. Ex. 1, pgs. 14-17. The complaint alleged that employees

were not protected from falls of 25 feet to a lower level while working on air conditioning units on the roof of the business. Ex. 1, pg. 4.

11. The inspection was opened on June 6, 2018, at which time CSHO Rodrigues met COO Martin and Eng. Dir. Marsh, and inspected the premises. Ex. 1, pgs. 14-17. CSHO Rodrigues also conducted interviews concerning the complaint. *Id.*; Ex. 1, pgs. 19-42.

12. The rooftop is noteworthy for its open sides and edges. Ex. 1, pgs. 84-93A.

13. There was a parapet wall of sorts at the perimeter, that ranged in height from ankle high to 34 inches. Ex. 1. pgs. 87-87B; *see* 1 Tr., pp. 29:4-7; 1 Tr. 98:1-7; 1 Tr. 102:18 through 103:7.

14. Access to the roof to refurbish the swamp coolers was by two hatches at Bay 5 and Bay 8. Ex. 1, 19-42; *see* 1 Tr. 27:10-12; 90:13-16; 119:25 through 120:2.

15. Employees gained access to the rooftop of the facility via a roof hatch, which opened at the roof's edge. Ex. 1, pgs. 15, 21, 28, 38, 88; *see* 1 Tr. 90, 102, 107.

16. The employees had to climb a rung ladder inside the building to gain access to the rooftop, through hatch cover holes in the roof at Bay 5 and Bay 8. 1 Tr. 19:2-7; *see* 1 Tr. 20:12-15; 27:10-12.

17. At the roof's edge, employees would bring tools and supplies to the rooftop using a five-gallon milk crate attached to a rope, tossed over the side of the roof to the ground. Ex. 1, pg. 20, 28, 38-39. The five-gallon crate was loaded and then the engineers would, peering over the side of the roof, pull on the rope to lift the crate the rooftop, with tools and supplies needed by the engineers to perform their work. *Id.*

18. Employees engaged in this activity approximately five times per day. Ex. 1, pg. 21, 28, 38.

19. Employees had worked under these conditions for a full three months as of June 6, 2018, the date the CSHO conducted the inspection. Ex. 1, pgs. 19, 27, 37.

20.The employees were not protected from falls while bringing up tools and supplies, required for them to perform their work. Ex. 1, pgs. 15, 20, 28-29, 38-39; 1 Tr. 140:2-5.

21. There was no guardrail or any other kind of safety measure at the hatch to prevent the employees from going over the side of the roof. Ex. 1, pgs. 14-17, 84-88A; 1 Tr. 139:3

through 140:5. There were no guardrails placed around the skylights or any other protective measures taken by APEX LINEN to keep the rooftop employees from falling through the skylights. *Id.*

22. No personal fall protective equipment was provided to the three employees working the roof, at any time prior to CSHO Rodrigues' investigation commencing June 6, 2018. 1 Tr. 139:3 through 140:5.

23. The water jug was purchased by Eng. Dir. Marsh, who also supplied the rope used to haul the tools and materials rooftop. 1 Tr. 146:24 through 147:4.

24. Eng. Dir. Marsh, himself, accessed the roof through the hatches at Bays 5 and 8. Ex. 1, pgs. 6-8.

25. He also used the milk crate and rope system, himself, to haul equipment to the roof for use by the three employees he had assigned to this duty. 1 Tr. 21:5-7; 180:1-15.

26. APEX LINEN had some fall protection policies, which it provided to NV OSHA. Ex. 1, pg. 179; *see* 1 Tr. 21:11-19.

27. Eng. Dir. Marsh was identified in the program as the responsible party for the fall protection plan. 1 Tr. 21:11-19; 37:25 through 38:18.

28. There was no discernible evidence produced by APEX LINEN that the three employees were given training on it before June 6, 2018. 1 Tr. 139:3 through 140:6; 177:23 through 179:3.

29. APEX LINEN's Ex. C, produced at the hearing, is a sign-up sheet showing that Engineer Arellano had received rooftop safety and fall protection training. The training is dated August 1, 2018, or after the fact of the three months employees worked the roof, without training.

30. No personal fall protective equipment was provided to the employees, even though they were working on a roof top with open sides and edges, were working around unguarded skylights, and were expected to haul their tools and equipment up to the roof, while standing at the very edge of an unguarded roof, where, if they fell, they would have landed 29 feet below to certain, serious injury, if not death. Similarly, a fall through a skylight, if incapable of withstanding the force of a human being falling upon or walking

on a skylight, would have also resulted in a fall of 29 feet to the floor below and resulted in certain severe injury, if not death.

31. The determinations that the consequences of a 29 foot fall were severe injury, if not death, were never contested.

32. Eng. Dir. Marsh secured and produced to NV OSHA the results of tests to measure the strength of skylights to withstand static and impact loads. One set of tests was completed on December 20, 2013, and reported on December 31, 2013. The other tests were conducted on February 12 and 25, 2010, and reported on March 1, 2010. *See* Ex. B, pgs. 50-52 and 58-60. (There was no explanation provided for the gap between page 52 and page 58.)

33. The test results were positive. For the test results reported December 31, 2013, static loads of 200 and 400 pounds produced no cracks or openings. For impact loads of 200 and 400 pounds, at a drop of 24 inches and 36 inches, there were no cracks or openings. Ex. B, pg. 52. For the test results reported March 1, 2010, the testing began at 400 pounds. The only cracking or partial disintegration began at 1,600 pounds.

34. According to frequently asked questions (FAQ) prepared by Bristolite, the skylight manufacturer (Ex. 2, pg. 140), the Federal OSHA standard for Walking-Working Surfaces; Guarding Floor and Wall Openings, Federal OSHA at 29 CFR §1910.23(e)(8), provides: "Skylight screens shall be of such construction and mounting that they are capable of withstanding at least 200 pounds applied perpendicularly at any one area on the screen. They shall also be of such construction and mounting that under ordinary loads or impact, they will not deflect downward sufficiently to break the glass below them." Ex. 2, pg. 149.

35. As to the life of a skylight, in another FAQ, Bristolite answered: "[The life of a skylight] varies widely. It depends primarily on the quality of materials used in the design and construction of the skylights." Ex. 2, pg. 144.

36. APEX LINEN offered in defense a letter of interpretation ("LOI") from Director John B. Miles, Directorate of Field Operations, dated February 16, 1984, addressing skylights. Ex. 2, pgs. 151-152. The LOI states that skylights are to be regarded as a hatchway, and thus an opening in a roof through which a person might fall. Ex. 2, pg. 151.

It clearly states that "29 CFR 1910.23(a)(4), therefore, requires that skylights in the roof of buildings through which persons may fall while walking or working shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides." *Id.* It also states, "When a skylight screen is selected for safeguarding the opening, and in the event the skylight is constructed of plastic material subject to fracture (as glass would be), then the skylight must at a minimum be provided with a skylight screen capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen. On the other hand, a plastic skylight which can provide the necessary structural integrity to support the 200-pound load would not be required to be further safeguarded, since it would meet the intended function of a screen as well." Ex. 2, pgs. 151-152. In other words, if a skylight is made out of plastic which can withstand a 200-pound load, it may stand alone as a secure hole in the roof. No other safety measures are needed to guard against an employee falling into this hole, known as a skylight, according to the February 16, 1984, LOI.

CONCLUSIONS OF LAW

1. Nevada Administrative Code 618.788 places the burden of proof on NV OSHA. NV OSHA must prove by a preponderance of the evidence that: (i) the cited standard applied to the condition; (ii) the existence of noncomplying conditions; (iii); employee exposure or access, and (iv) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition." *See* Belger Cartage Service, Inc., 7 9 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); Am. Wrecking Corp. v. Sec'y of Labor, 351 F.3d. 1254, 1261 (D.C. Cir. 2003).

2. 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).

3. The Review Board concludes that NV OSHA has met this burden in the prosecution of this matter for each of the two citations being brought in this case.

4. Employees are required to be protected from fall when on a walking or working surface 4 feet or more above a lower level.

5. Based upon the facts above, the State has proven a prima facie case for Citation 1, Item 1, for a violation of 29 CFR §1910.28(b)(1)(i).

6. The standard applies as, by its terms, it is intended to protect employees who are working on a surface with unprotected sides and edges.

7. The interviews and/or testimony of Engineer Servin, Engineer Arellano, and Engineer Walker, along with the submitted photographs, reveal that the walking and working surface was unprotected at the sides and edges.

8. The hatch through which the engineers accessed the roof was immediately adjacent to unprotected edges at Bays 5 and 8. These are the circumstances that 29 CFR §1910.28(b)(1)(i) on its face addresses.

9. The three engineers were the intended beneficiaries of 29 CFR §1910.28(b)(l)(i).

10. They were exposed as they were working in a zone of danger. First, they were on a rooftop with exposed and unprotected sides and edges.

11. The parapet wall, to the extent it existed, ranged in height from ankle height to 34 inches. It offered little protection for the engineers working on the rooftop. The employees were working there without a guardrail system, a safety net system, or any personal fall protection systems such as a personal fall arrest system, travel restraint or a positioning system.

12. The employees, while working around unprotected sides and edges, hoisting tools and supplies by a rope and carton, while looking over the side of the building down 29 feet below, were at risk, without any protection.

13. Though not cited for this regulation, 29 CFR 1910.22, "General requirements", provides that "[t]he employer must provide, and ensure each employee uses, a safe means of access and egress to and from walking-working surfaces." 29 CFR §1910.22(c).

Employers "...must ensure that each walking-working surface can support the maximum intended load for that surface." 29 CFR §1910.22(b).

14. These regulations should heighten an employer's awareness of the gravity of working at heights by the comprehensive nature of the protections afforded.

15. Knowledge of the aberrant and perilous working conditions is also established.

16. Eng. Dir. Marsh assigned Engineer Servin, Engineer Arellano, and Engineer Walker to the rooftop duty. Ex. 1, pg. 6-8. He also bought the water jug, and supplied the milk crates and rope that Engineer Servin, Engineer Arellano, and Engineer Walker used to haul tools and equipment to the rooftop. *Id.*

17. Eng. Dir. Marsh knew the three employees were using the rope and milk crate method. 1 Tr. 167:23 through 168:2.

18. Eng. Dir. Marsh, as the Director of Engineering, had to be a part of management. He was also an employer representative during the initial consultation with CSHO Rodrigues at the outset of the investigation. Ex. 1, pgs. 14-17. Eng. Dir. Marsh admitted he also hauled equipment up to the roof using the rope and carton system he supplied. 1 Tr. 180. To do so, he accessed the roof through the unguarded hatch opening to the roof.

19. Eng. Dir. Marsh clearly had actual knowledge of the hazardous working conditions on the rooftop, as he himself accessed the rooftop, supplied and used the milk crate and rope system to get tools and equipment to the roof. 1 Tr. 146:24 through 147:4; 167:23 through 168:2; 180:1-15; *see* Ex. 1, pgs. 6-8.

20. Eng. Dir. Marsh also knew of the warning label on the skylights, as he had read it. 1 Tr. 138:7-16. Eng. Dir. Marsh never acted upon it as none of the three employees working the roof knew of the language of the warning on the skylights.

21. As a member of management for APEX LINEN, with actual knowledge of the working conditions, employer knowledge is established.

22. APEX LINEN also had a safety program of its own, which it ignored. 1 Tr. 139.

23. Eng. Dir. Marsh was responsible for the implementation of the safety program. The Employer had to know, therefore, that concerns about safety measures would attend working at heights around unguarded and exposed sides and edges. If Eng. Dir. Marsh

was not a member of management, under these circumstances, his knowledge of working conditions may still be imputed to APEX LINEN. *See* Original Roofing Co., LLC v. Chief Administrative Officer of the Occupational Safety and Health Administration, 135 Nev. Adv. Op. 18, 442 P.3d. 146, 149(2019).

24. The failure of an employer to observe, as here, its own workplace safety program is evidence of a failure to provide a safe work and workplace environment. *See* BHC Northwest Psychiatric Hosp., LLC v. Sec'y of Labor, 951 F.3d 558, 445 U.S. App. D.C. 341, 2020 OSHD (CCH) P33, 778, 2020 WL 1017618 (March 3, 2020).

25. Knowledge of APEX LINEN is further established through COO Martin, APEX LINEN's Chief Operating Officer.

26. He himself accessed the roof by using the access hatch openings at bays 5 and 8. 1 Tr. 20; *see* Ex. 1, pg. 9. COO Martin also had three years experience as a roof inspector and held an OSHA 30-hour card. He admittedly was aware of the large number of skylights on the roof. 1 Tr. 17, 19. Ex. 1, pg. 9. The 30-hour OSHA card is significant because it meant that COO Martin attended training, including fall protection and hazard awareness. 1 Tr. 120. Combined with the three years of roof inspections and actual access to the rooftop, COO Martin must have been fully cognizant of the working conditions on the rooftop to which Engineer Servin, Engineer Arellano, and Engineer Walker were subjected.

27. The overwhelming body of evidence shows a violation of 29 CFR §1910.28(b)(1)(i).

28. The classification of "Serious" for Citation 1, Item 1, was never challenged by APEX LINEN. It cannot be realistically challenged as, if this citation item is sustained, it has to be sustained as a serious violation. A fall from 29 feet to a concrete surface below could only result in serious injury, if not death.

29. The Review Board concludes that the State established the classification as Serious, the probability of a repeat offense, the gravity of the offense and the extent of the violation. These employees were at serious risk, working totally unprotected at 29 feet.

30. The Review Board also concludes that the assessment in the amount of $7,000, without deduction, is appropriate.

31. Based upon the facts above, the State has also proven a prima facie case for Citation 1, Item 2, for a violation of 29 CFR §1910.28(b)(3)(i).

32. It is beyond dispute that skylights were everywhere on the rooftop, 39 to be exact. *See* Ex. 1, pgs. 84-93A.

33. It would be impossible not to be in the vicinity of the skylights, when refurbishing the swamp coolers, ingressing and egressing the roof, and hoisting tools and supplies from the ground. *See* 1 Tr. 27.

34. It is also beyond dispute that APEX LINEN provided no covers to the skylights, guardrail systems, travel restraint systems or personal fall arrest systems, or any other protective measures taken by APEX LINEN to prevent employees from falling through them, because APEX LINEN provided no fall protection at all to Engineer Servin, Engineer Arellano, and Engineer Walker. 1 Tr. 140; *see* 1 Tr. 138; Ex. 1, pgs. 53, 66.

35. More concerning, Engineer Walker was left to work alone on the roof in the evening. 1 Tr. pg. 31, 59. There was no information given on how long it would have taken to discover that he was injured, if something happened to him.

36. Eng. Dir. Marsh, the person who made the rooftop assignment, was aware of the gravity of the situation. He had read the ominous warning placed on the side of the skylights, quoted above. *See also* Ex. 3, pg. 170.

37. He claimed to have an OSHA 30 card, so should have been aware of the perils of working at heights of 29 feet from a concrete floor.

38. The training topics of an APEX LINEN training sign-up sheet entitled, "Roof top safety and Fall Protection" included the nature of fall hazards, procedures to minimize hazards, and the correct use of fall systems and equipment. Ex. C.

39. This shows further awareness by APEX LINEN of the perils of working at heights in rooftops and around skylights.

40. Management, through Eng. Dir. Marsh, imposed no restrictions on access to the roof and Engineer Servin, Engineer Arellano, and Engineer Walker were not warned of the perils of working around the skylights. 1 Tr. 139, 178, 179.

41. The Review Board acknowledges that APEX LINEN argues that this does not matter and there is no violation because the skylight requires no caution or protection as the skylights are strong enough to withstand the minimum standards, on their own, set by OSHA. 1 Tr. 75-80, 124; *see* 29 4 CFR § 191 0.23(a)(4) ("Every skylight floor opening and hole shall be guarded by a standard skylight screen or a fixed standard railing on all exposed sides."); *see also* 29 CFR § 6 1910.23(e)(8) ("Skylight screens shall be of such construction and mounting that they are capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen.").

42. The Review Board acknowledges that APEX LINEN points to the two tests it cited at the hearing as proof that the skylights here can withstand a 200 pound load applied perpendicularly at any one area of the skylight. Ex. B, pgs. 50-52, 58-60. APEX LINEN then points to the February 16, 1984, LOI, which states that no screening or other protection around the skylight is required if the skylight is made out of plastic and is "...capable of withstanding a load of at least 200 pounds applied perpendicularly at any one area on the screen (skylight)." Ex. 2, pg. 151.

43. The Review Board notes APEX LINEN's conclusion that, taking these tests and the February 16, 1984, LOI in concert, the fact that there was no screening, guard rails, or other form of protection for working around these skylights is of no moment as none is required, and there is no violation of 29 CFR §1910.23(b)(3)(i). APEX LINEN thus claims Citation 1, Item 2, should be dismissed because State OSHA did not prove that the skylights were unable to withstand the 200 pound load identified in the February 16, 1984, LOI. 1 Tr. 75-80, 124.

44. The Review Board thus considers two questions: 1) whether it is the burden on the State to show not only that safety precautions were not taken in relation to the skylights, but also that the skylights were unsafe because they could not withstand the 200-pound load, or; 2) whether the burden is upon APEX LINEN to prove that the safety precautions were unnecessary because the skylights could withstand the 200 pound load, rendering the safety measures moot.

45. The State did not attempt to prove the skylights could not withstand a 200 pound load.

46. The answer to these questions lies in the Nevada Rules of Civil Procedure ("NRCP") which apply to proceedings before the Review Board, unless expressly indicated otherwise. *See* NAC 618.680(2).

47. Specifically, the answer lies in NRCP Rule 8(c), governing affirmative defenses. To defend on the basis of the February 16, 1984, LOI, APEX LINEN must do more than simply deny that it violated 29 CFR §1910.23(b)(3)(i) in order to escape liability. A simple denial of liability could be based upon any number of reasons and, therefore, APEX LINEN would have to affirmatively establish the relevance of the February 16, 1984, LOI, and how it would operate in concert with the load testing results, to avoid being found guilty of the skylight citation. *See* Sejour v. Steven Davis Farms, LLC, 28 F. Supp.3d 1216, 1224 (N.D. Fla. 2014); Will v. Richardson-Merrell, Inc., 647 F. Supp. 544, 547 (S.D. Ga. 1986).

48. The Review Board holds that proof that the skylights can withstand the 200 pound load, so that in concert with the February 16, 1984, LOI there is no violation for failing to implement safety measures, constitutes an affirmative defense.

49. The burden of proof is, therefore, upon APEX LINEN to prove that the skylights here were capable of withstanding the 200 pound load factor. *See* Jensen Construction Co., 7 OSHC 1477, 1979 OSHD ¶ 23,664, p. 28,694 (1979); Sanderson Farms Inc., v. OSHRC, 348 Fed.Appx. 53, 57 (5' Cir., 2009)(once a prima facie case is shown, it is then incumbent upon the employer to prove its affirmative defenses, if any.)

50. APEX LINEN failed in its burden.

51. APEX LINEN provided no proof that the skylights on the rooftop of its facility could withstand the 200 pound load standard because APEX LINEN introduced no evidence to show that the skylights, the subject of the testing, were comparable in age or composition to those on the rooftop at APEX LINEN.

52. There was no evidence introduced to show that the skylights, the subject of the testing, were exposed to the same range of heat, wind, rain or cold to which the APEX LINEN skylights are exposed in Las Vegas.

53. No evidence was introduced that the APEX LINEN skylights were comparable in quality to those the subject of the testing. If anything, the comparison amounted to proverbial apples to oranges.

54. The Review Board finds that the test results do not show that the APEX LINEN skylights can withstand a 200 pound load, and that, therefore, APEX LINEN has failed to prove its affirmative defense to Citation 1, Item 2.

55. APEX LINEN provided no information from which could be drawn a reasonable inference that the skylights tested were the same or reasonably the same as APEX LINEN's skylights so that it could be determined fairly and reasonably that APEX LINEN's skylights could perform as well as the skylights that were tested.

56. The Review Board also finds, based upon the same reasoning applicable to Citation 1, Item 1, that the classification of "serious" is correct.

57. The element in the prima facie case of knowledge is established and for the same rational set out for Citation 1, Item 1 (29 CFR § 1910.23(b)(1)(i)), is an appropriate regulation to be applied, here.

58. The evidence reveals that the engineers were working in the zone of danger around the skylights, there was non-compliance upon a failure of APEX LINEN to prove the skylights could withstand a 200 pound load factor, and there was actual and constructive knowledge of the working conditions on the rooftop, which could, under the circumstances, be imputed to management. *See* Original Roofing, supra, at 149.

59. The fact that no one fell through the skylights does not foreclose a finding upholding Citation 1, Item 2. *See* Brennan v. Occupational Safely & Health Review Comm 'n., 513 F.2d 1032, 1039 (2nd Cir., 1975) (need not prove teetering on the edge of an unguarded floor).

60. The Review Board finds and concludes that Citation 1, Item 1 is sustained, including the classification of serious, requiring the payment of a fine in the amount of

$7,000; and the Review Board finds and concludes that Citation 1, Item 2, is also sustained, including the classification of serious, requiring the payment of a fine in the amount of $7,000.

FINAL ORDER

1. Citation 1, Item 1, is AFFIRMED as a SERIOUS violation of the cited standard, 29 CFR 1910.28(b)(1)(i);

2. The penalty amount for Citation 1, Item 1, of Seven Thousand Dollars ($7,000), is APPROVED;

3. Citation 1, Item 2, is AFFIRMED as a SERIOUS violation of the cited standard, 29 CFR 1910.28(b)(3)(i);

4. The penalty amount for Citation 1, Item 1, of Seven Thousand Dollars ($7,000), is APPROVED;

5. Any of the Findings of Fact that are more appropriately deemed Conclusions of Law shall be so deemed. Any of the Conclusions of Law that are more appropriately deemed Findings of Fact shall be so deemed.

6. Any party who is aggrieved by this order may filed a petition for judicial review in accordance with NRS Chapter 233B.

DATED this 30th day of November, 2023.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

RODD WEBER, Chairman

Submitted by:

Salli Ortiz, Division Counsel
Division of Industrial Relations
400 West King Street, Suite 201
Carson City, Nevada 89703

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, OSHA Docket LV 18-1935,** by the method indicated below, and addressed to the following:

Eric Beckman, Esq. Breakwater Management 2121 Avenue of the Stars Suite 800, Century City, CA 90067	**U.S. Mail** _____Via State Mail room __xx__Certified Mail:7022 2410 0001 5083 9145 _____Electronic Mail _____Deposited directly with U.S. Mail Service _____Overnight Mail _____Interdepartmental Mail
Rodd Weber, Chairman Nevada Occupational Safety & Health Review Board c/o CHARLES R. ZEH, ESQ. 50 W. Liberty Street, Suite 950 Reno, NV 89501	_____Via State Mail room __xx__Certified Mail:7022 2410 0001 5083 9138 _____Electronic Mail _____Overnight Mail _____Interdepartmental Mail _____Messenger Service

DATED this 30th day of June, 2023.

Christy Bateman

State of Nevada Employee