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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.** **HIRSCHI MASONRY, LLC,** **Respondent.**	**Docket No. LV 19-1979**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION OF THE BOARD

This matter initially came on for hearing before the Nevada Occupational Safety and Health Review Board on July 10, 2019, in furtherance of a Notice duly provided according to law. This case was heard on July 10, 2019 and the deliberations took place on the same date with the Board rendering its decision on July 10, 2019.

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, Hirschi Masonry, LLC, were Rick Roskelley, Esq., and Amy Thompson, Esq., of the law firm of Littler Mendelson, PC. Board of Review members in attendance for the hearing were Chairman, Steve Ingersoll, Board Secretary, Rodd Weber, and Members, 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.

Jurisdiction in this matter is not disputed and is conferred in accordance with NRS 618.315. Also, a complaint may be prosecuted which arises before or during an inspection of the employer's workplace. *See,* NRS 618.435(1). 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 the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).

At the outset of the hearing, the State offered for admission into evidence Exhibit 1, consisting of pages 1 through 74 and Exhibit 2, consisting of pages 75 through 93. Tr.,[1] p. 10;18-20. There was no objection offered to the admission of the State's exhibits and they were accordingly admitted without objection. Tr., p., 10;11.

The Respondent offered Exhibits 1 through 12, consisting of Hirschi pages 001-146, which are Tabbed 1 through 12. Tr., p. 11. The State registered an objection to Exhibit 12, which was not actually being offered at the outset of hearing. Tr., p. 11. There was no objection to Respondent's Exhibits tabbed 1 through 11 and they were, therefore, admitted without objection. Tr., p. 12. Hirschi's Exhibits actually ended at Hirschi page 145.

Hirschi Masonry, LLC, the respondent, is a domestic limited liability company, organized and operating under the State of Nevada. Exhibit 1, p. 1. Hirschi Masonry's principal place of business is 4120 Losee Road, North Las Vegas, Nevada. The address of the incident where the project was under construction is 2955 Westwood Drive, Las Vegas, Nevada. Exhibit 1, p. 15. This case is before the Board upon a self referral from Hirschi Masonry, Exhibit 1, p. 19. The person making the referral from Hirschi Masonry was Jeff Yoakum. Exhibit 1, p. 20.

Monument Construction, LLC, was the General Contractor on the job. Hirschi Masonry was the sub-contractor performing masonry work for Monument Construction, LLC.

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[1]"Tr." stands for the transcript of the hearing on the merits of the case. "2 Tr." stands for the transcript of the hearing on the Board's deliberations leading to the Board's decision.

Depending upon the witness, the incident took place on May 28, or May 29, 2018. Exhibit 1, pp. 8, 20. The employer claims that the incident was reported the same day as it occurred. Tr., pp. 119, 120. The State OSHA believes the incident was reported the next day, May 29, 2018. Exhibit 1, p. 8.

Regardless, in a nutshell, on the day in question, employees of Hirschi Masonry, LLC, were working from a non-stop heavy duty scaffold located at 2955 Westwood Drive, North Las Vegas, Nevada. An employee, Lemus Ibarra, was assembling a rest station on the scaffolding. He shuffled three planks that made up the walking surface off of the end of the scaffold bearer in order to attach a rest platform on the exterior. This allowed the planks to cantilever on the previous bearer. An employee, Miguel Barbosa, was unaware of the work being done by Mr. Ibarra, a competent person. He stepped on the cantilevered planks as he was walking towards the access ladder on the westside of the scaffold and fell approximately 11 feet to the ground below as the planks tipped. Mr. Ibarra did not block access to the cantilevered planking, thereby, exposing the employee to serious fall hazards that led to multiple, serious injuries. Exhibit 1, p. 36.

Mr. Ibarra was essentially working alone to install the rest station on the scaffolding. A small crew, however, was working on another area of the same scaffolding. Mr. Ibarra had his back to the other workers and, therefore, did not hear Mr. Barbosa approach him when he stepped on the plank and fell.

Mr. Ibarra failed to barricade the area on the scaffolding where he was working to install the rest station. He also failed to verbally warn employees that he was installing the rest station on the scaffolding and he failed to tag out the area to give warning to other employees that the scaffolding was under construction. The crew leader, Rodrigo Macias, was with the other employees working off of the scaffolding. Like Mr. Ibarra, Mr. Macias was a competent employee for scaffolding purposes.

Because the job foreman, Fernando Mozquedas, had absented himself from the job site, Mr. Macias, as crew chief, was elevated to the position of the person who was in overall charge of the worksite around the scaffolding. Mr. Mozquedas had directed Mr. Ibarra and Mr. Macias

to install the rest station on the scaffolding after lunch on the day of the incident. After giving this direction, he left the work site to attend to other work sites he was managing as foreman on those jobs for Hirschi Masonry. *See,* Exhibit 1, p. 8.

Hirschi Masonry was performing new construction masonry work at the time of the incident and is, therefore, governed by the construction standards in 29 CFR 1926. 29 CFR 1926 Sub-part L contains standards related to scaffolds and 29 CFR 1926.451 sets forth the requirements for the use of equipment. The State charged Hirschi Masonry with a serious violation of 29 CFR 1926.451(b)(5)(ii), which provides as follows:

> Each platform greater than 10 feet in length shall not extend over its support more than 18 inches (46 cm), unless it is designed and installed so that the cantilevered portion of the platform is able to support employees without tipping, or has guardrails which block employee access to the cantilevered end.

Pursuant to NAC 618.788, the burden is upon the Chief or Complainant to prove 29 CFR 1926.451(b)(5)(ii) was violated. This burden entails proof of a *prima facie* case which requires a showing of: (1) the applicability of the OSHA regulation to the matter at hand; (2) non-compliance with the OSHA regulation; (3) employee exposure to the hazardous conditions, the subject of the OSHA regulation; and, (4) the employer's actual or constructive knowledge of the wrongful conduct. *See, Original Roofing Company, LLC. v. Chief of Administrative Officer of the Occupational Safety and Health Administration,* 135 Nev. 140, 442 P.3d 146, 129 (2019).

Counsel for the State and Hirschi Masonry both agree that there is no dispute that the first three elements of the *prima facie* case were made out. All that was left in doubt to prove was the fourth element of the *prima facie* case, the employer's actual or constructive knowledge of the wrongful conduct plus whether un-preventable employee misconduct intervened as a complete defense to the Citation.

The Board of Review concludes that the State has met the burden in the prosecution of this matter, finding that Hirschi Masonry had actual or constructive knowledge of the circumstances causing the violation and that the un-preventable employee misconduct doctrine doe not apply to this case.

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STATEMENT OF FACTS

To the extent the preceding discussion constitutes statements of fact, they are incorporated herein. Analysis begins, however, with the recognition that neither party disputes that there was a violation of 29 CFR § 1926.451(b)(5)(ii). Counsel for the State conceded that the only *prima facie* issue before the Board is employer knowledge. Tr., p. 52;20-23. *See also,* Tr., p. 144, for further concessions on the issue of employer knowledge being the only justiciable issue left for the Board to decide out of the four elements of a *prima facie* case.

Counsel for Hirschi Masonry concedes the same point. Tr., p. 148;23-25. Hirschi does not deny that 29 CFR § 1926.451(b)(5)(ii) was applicable, and it was violated. The injured worker suffered serious injury and, thus, there is no question, there was exposure. In all respects, the first three elements of a *prima facie* case, it is agreed, have been shown. Tr., p. 149;9-14. *See also,* Tr., p. 14;3-4, 12 ("we are not going to contest that there was a violation of the standard.").

That leaves for dispute, whether knowledge of the violation may be attributable to Hirschi as the employer. Knowledge may consist of direct knowledge or proof the employer should have known of the violating conditions. *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98 (2d Cir. 1996). Such knowledge may also be imputed to the employer. *See, Original Roofing, supra* at 143. In either event, the burden of proof lies with the State to prove such knowledge. *Id.* at 142; *N.Y. State Elect., supra* at 105.

If knowledge is shown, however, Hirschi Masonry claims it is trumped in this case by un-preventable employee misconduct, Tr., p. 150. Un-preventable employee misconduct is an affirmative defense, the elements of which must be proven by the employer, in his case, Hirschi Masonry. *See, Danco Const. Co. v. Occupational Safety & Health Review Comm'n*, 586 F.2d 1243, 1246 (8th Cir. 1978). If shown, it is a complete defense to the State's charge or complaint. *See, ComTran Group, Inc. v. U.S. Dept. Of Labor,* 722 F.3d 1304, 1308 (11th Cir., 2013).

We begin with the fact that Fernando Mozqueda was the job foreman on May 28, 2018, the date of the incident. Tr., p. 37. As a foreman, he was responsible for all that was happening on the job site. Tr., pp. 37, 53, 142. He was a competent person for scaffolding purposes. Tr.,

pp. 49, 50, 127. He had the authority as a foreman and competent person to shut down a job site for safety reasons. Tr., pp. 26, 37. It also meant that according to Hirschi's safety program, Mr. Mozqueda had the duty to personally supervise the work where there were dangerous or unusual circumstances are present. Hirschi Exhibit Tab 10, p. 121. He was the foreman on other job sites as well, which took him away from the job site at 2955 Westwood Drive, Las Vegas, Nevada, where the incident occurred. Tr., pp. 45, 55, 123, 129. *See also,* Exhibit 1, p. 15 .

Mr. Mozqueda was present at the job site on the morning of the incident. Tr., pp. 36, 136. He left the job site before lunch on the day in question. Tr., pp. 22, 53, 129. Before he left, however, he met with Mr. Ibarra and Mr. Macias. Tr., pp. 40, 53, 55, 129. He instructed them that the rest station on the scaffolding was to be installed that day. Tr., pp. 22, 23, 39, 40, 60. According to Steve Pupp, the State's investigator on this case and a safety inspector at the time, Mr. Mozquedas told Mr. Lemus to install the rest station. Tr., p. 21;24-25. Mr. Mozquedas states he doesn't recall whether he gave instructions to Mr. Macias or Mr. Ibarra to install the rest station. Tr., p. 129. Mr. Ibarra, according to Mr. Mozquedas was a competent person. *Ibid.*

Mr. Macias was also recognized as a competent person for scaffolding purposes. Tr., pp. 36, 136. That meant both Mr. Ibarra and Mr. Macias could shut down work at the job site if adverse conditions presented themselves. Tr., pp. 36, 37, 42, 54, 59, 64.

After Mr. Mozquedas met with Mr. Ibarra and Mr. Macias, he left the job site. The incident took place while Mr. Mozquedas was absent. Tr., p. 56. Before he left, however, he understood that there would be other employees of Hirschi Masonry working from the scaffold where Mr. Ibarra would be installing the rest station on the same scaffold. Mr. Macias, however, who would be working from the same scaffold as Mr. Ibarra, would be, Mr. Mozquedas understood, the crew leader on site in Mr. Mozquedas' absence. Tr., pp. 36. *See also,* Tr., p. 116. As a crew leader, Mr. Macias would then be in charge of the job site. Tr., p. 116. As a crew leader, he would also be responsible for personally supervising work under unusual or dangerous circumstances, according to the Hirschi safety plan. Hirschi Exhibit Tab 10, p. 121.

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According to Mr. Mozquedas, there was no foreman on the job site after his departure. Tr., p. 143. *See also,* Tr., pp. 116, 117. There was a crew leader, however, Mr. Macias, whom he thinks was within 50 feet of Mr. Ibarra as he was installing the rest station, Tr., p. 143. Superintendents, foremen and crew leaders, according to Hirschi's safety manual, Exhibit Tab 10, p.121, should personally supervise unusual or hazardous work. Tr., p. 137. But, Mr. Mozquedas does not know if Mr. Macias was personally looking at Mr. Ibarra, to see what he was doing, Tr., p. 143, though Mr. Ibarra would have been under Mr. Macias' charge. According to Wesley Pettus, however, Mr. Macias was not watching what Mr. Lemus was doing. Tr., p. 116. And, there was no other foreman, superintendent, or manager personally supervising Mr. Ibarra at the time. Tr., p. 116. Mr. Pettus was the then safety manager for Hirschi Masonry. Tr., p. 97.

After the incident, Mr. Mozquedas was notified of the fall. He returned to the job site. Mr. Ibarra was the overt miscreant. Tr., p.102. His conduct was the direct and overtly proximate cause of the fall, according to Hirschi's own investigation. Mr. Mozquedas recommended that Mr. Ibarra be disciplined for the incident. Tr., pp. 1-2, 103. As Mr. Mozquedas had left the job site as of the time of the fall, he had no direct, first hand knowledge of how fall occurred. Tr., p. 56. His knowledge was only general as of the time of the fall, being aware of the fact that Mr. Macias and his crew would be in the vicinity of Mr. Ibarra while he was installing the rest station. Tr., pp. 50, 53, 54, 55, 56, 135, 136, 143, 144. Ultimately, Mr. Mozquedas had no knowledge about the installation of the rest station, itself, as he was not present while Mr. Ibarra was assembling it, Tr., pp. 43, 45, 56. In fact, according to Steve Pupp, other than Mr. Lemus, there was no other person Mr. Pupp could state had actual knowledge of the incident. Tr., p. 42. Mr. Lemus had actual knowledge, but Mr. Mozqueda was not on site. Tr., p. 45.

Turning to Mr. Ibarra, the State concedes he was a competent person for scaffolding purposes. Tr., p. 144. The State makes no claim Mr. Ibarra was untrained as a competent person. Tr., p. 144 (the State "issued no training citations"). Mr. Ibarra, himself, claims he was the competent person for scaffolding for Hirschi Masonry. Tr., p. 61. He admits further he was

the designated competent person for this work site, at the time of the incident. Tr., p. 59.

Mr. Ibarra claims that during the lunch break, he was told by Mr. Mozqueda and Mr. Macias to install the rest station on the scaffold after the noon break. Tr., p. 60. Mr. Mozqueda agrees. Tr., p. 21.

When assembling the work station at an elevation of 12 feet, Mr. Ibarra had his back to the rest of the scaffolding, while facing the wall. Tr., pp. 23, 61. Mr. Ibarra was fixing some plates on the scaffold in the front of where the injured worker, Miguel Barbosa, fell from the scaffolding. Tr., p. 24. Mr. Ibarra had reshuffled the planking in the vicinity where he was working, so that the planking was not supported by a bearer and extended out, being cantilevered at more than 18 inches creating an unsafe condition that overtly and directly precipitated the fall and constituted the actual violation of 29 CFR 1926.451 (h)(5)(ii). Mr. Barbosa was coming down to get mud or buckets. He stepped on the shuffled three planks that Mr. Ibarra had moved and were no longer adequately supported. Mr. Barbosa fell approximately 12 feet. As he was falling, he grabbed a block from the top of the wall to try and stop the fall. Instead, the block came down on top of Mr. Barbosa, hitting him in the head. He suffered brain trauma, a fractured pelvis, C-5 vertebrae and sternum. Tr., pp. 24, 25, Exhibit 1, p. 36.

Though his back was to the rest of the crew working elsewhere on the scaffolding, Mr. Ibarra was aware that other employees were working some distance away from them. Tr., p. 23. As his back was to the other crew members, Mr. Ibarra did not see Mr. Barbosa as he was approaching him until it was too late to warn him about the planking. Tr., pp. 23, 26.

Before starting work on the rest station, reshuffling the planking on the scaffolding and altering the scaffolding, thereby creating a dangerous condition, Mr. Ibarra did not warn the other crew members that he was altering the scaffolding. Tr., pp. 47, 65. He admits, further, he did not barricade or block access to the area where he had altered the scaffolding. Tr., p. 60. He admits, he did not tag out the area. Tr., p. 64. He did neither because he believed no one else was working in the area. Tr., p. 65. He admits further, he should have barricaded or tagged out the area, even though no one else was working around him. Tr., pp. 60, 64, 65, 105. He also admits that even though no one else was working in the area, he should have warned employees

of the work he was doing, he should have barricaded the area, he should have tagged out the area, or all three. Tr., p. 65. Lastly, everything Mr. Ibarra did was contrary to what Hirschi trained him to do. Tr., pp. 102, 105.

Mr. Ibarra was a competent person for scaffolding on the job site. Tr., p. 91. While he was a competent person, he was not in charge of the work site. Tr., p. 91. He was, however, working alone, or so he thought, in disregard of his training, Tr., p. 60, as he claims he was given training on the correct way to install a basket (rest station), including setting up barriers to restrict access. Tr., p. 105. His training also included initial, new employee training, additional safety training, safety training on June 8, 2017, and scaffolding training, Tr., p. 64, he admits. He had also received OSHA 30 training, was taught the safety steps for installation and removal, and had training on scaffolding from the union. Tr., p. 62.

Following the incident, Mr. Ibarra was retrained. Tr., p. 35. Mr. Ibarra admits, also, he was disciplined for not blocking out or tagging out. He was suspended for two weeks without pay as a result of the incident. Tr., p. 66.

Turning to Mr. Macias, he was not called to testify, a suspect circumstance. 2 Tr., p. 27. There is no direct evidence, therefore, attributed to him. Mr. Mozqueda, who made the assignment to install the rest station, does not recall whether he gave the assignment to Mr. Ibarra or Mr. Macias. Tr., p. 129. Mr. Macias was a competent person, however, Tr., p. 129, and both Mr. Ibarra and Mr. Macias were present when, before noon, the assignment was made. Mr. Macias was, therefore, aware that Mr. Ibarra would be altering the scaffolding, that afternoon. As Mr. Mozqueda, the foreman, was not going to be present after making the assignment, the person in charge of the site defaulted to Mr. Macias, because he was the crew leader at the time of the incident. Tr., pp. 36, 116.

According to Steve Pupp, there were only two employees working at the site of the fall, Mr. Ibarra and Ben Martinez. Mr. Martinez did not see the actual incident. Tr., p. 25 . Other than Mr. Ibarra, there are no other individuals who would have knowledge as to the actual failure of the barricade. Tr., p. 42. Mr. Pupp, however, claims that Mr. Macias, in his capacity as crew leader, knew that the platform was being installed. Tr., p. 43.

According to Mr. Pettus, Mr. Macias was personally supervising the work at the time of the accident. He was onsite as a supervisor, but to his knowledge, Mr. Macias was not watching what Mr. Ibarra was doing. Tr., p. 116. Knowing, however, that Mr. Ibarra would be altering the scaffolding to install the rest station, Mr. Macias would have been responsible for making sure that Mr. Ibarra was blocking the area, tagging it out, or at the very least warning his employees working immediately under him in the vicinity of Mr. Ibarra, *see,* Exhibit 1, pp. 30, 33, the hand drafted maps, to stay away from Mr. Ibarra's work area.

There is nothing in the record, that Mr. Macias did any of this, especially when it is not even clear he was watching Mr. Ibarra. Tr., p. 116. Nevertheless, Mr. Macias, a crew leader and competent person, knew that Mr. Ibarra was installing the rest platform. Tr., p. 43. Mr. Mozqueda believes that Mr. Macias was within 50 feet of Mr. Ibarra when altering the scaffolding. Tr., p. 143. Mr. Mozqueda does not know if Mr. Macias was looking after Mr. Ibarra, but he believes Mr. Macias was on site. Tr., p. 143. According to Mr. Ibarra, however, Mr. Macias was in charge, and that Mr. Macias and some other crew members were on the scaffolding. Tr., p. 70.

As for the training of Mr. Macias, there is no direct evidence of the actual training, he personally received. Presumably, he was the beneficiary of the ambient training conducted by Hirschi Masonry. This is, however, speculation. There is no evidence, moreover, that Mr. Macias received training about the role of a crew leader when left in charge of the work site upon the departure of higher ranking supervisory personnel.

Turning, then, to the training environment at Hirschi Masonry, Mr. Pupp reviewed Hirschi's safety program and found it adequate. Tr., p. 32. The State, admittedly, issued no training citations regarding Hirschi's training regime. Hirschi Masonry provides tool box training, once a week on Friday. Tr., p. 125. Hirschi reminds personnel daily about safety. Tr., p. 125. Scaffolds are inspected daily, at the start of use and at the end of the day. Tr., p. 127, 128. Hirschi Masonry also hosts conferences about safety, twice a year. Tr., p. 94, 95. Training is provided in Spanish, but the written material is in English. Tr., p. 92. Supervisors and trainers are bi-lingual. Tr., pp. 92, 93, 94.

Hirschi Masonry also employed a third party to provide training to the work force. Virginia Toalepai, the owner and CEO of the third party training company, World Wide Safety, Tr., p. 71, personally provided training, including an orientation slide show that was nonetheless written in English. Tr.,p. 93. Her company also conducted field audits and inspections of the work force. Tr., p. 94. When employees are found in violation of a company safety policy or procedure, they are re-trained in addition to being disciplined. Mr. Ybarra was retrained after the incident. Tr., p. 69.

As for the central individuals, Mr. Mozqueda received OSHA 30 training, fall protection training for working on scaffolds and scaffolding training. Tr., p. 127. And, as indicated, there is no dispute Mr. Mozqueda was trained as a competent person.

Similarly, there is no dispute that Mr. Ibarra was adequately trained as a competent person. The State concedes the point. Tr., p. 144. Therefore, as the overt miscreant, Mr. Ibarra clearly knew that when he was altering the scaffold, he was violating procedures by failing to block the area and tag out the work site, points he also concedes. As a competent person on the work site, he was a representative of management with knowledge of the conditions that led to the fall by the injured worker.

This leaves Mr. Macias. The training he received and his understanding of it, is left to speculation, even though Mr. Macias was the person in charge of the job as a crew leader once Mr. Mozqueda left the job site. He also knew that the scaffolding was going to be altered since he was present when Mr. Mozqueda gave the order before lunch to both Mr. Ibarra and Mr. Macias to install the rest station on the scaffolding. He knew that after lunch, Mr. Ibarra was going to alter the scaffolding.

Mr. Ibarra, the evidence shows, was working on the scaffolding at the same time Mr. Macias and other personnel under his direction were on the scaffolding. As shown by the hand drawn site maps, Exhibit 1, pp. 30, 73, Mr. Macias and the rest of the crew were in the vicinity of Mr. Ibarra as he was altering the scaffolding and creating a hazardous condition. Mr. Mozqueda believed Mr. Macias was within 50 feet of where Mr. Ibarra was working. According to the hand draw diagrams, Mr. Macias and his crew were quite close to Mr. Ibarra.

Under these conditions, Mr. Macias, as a member of management at the time and also a competent person with authority to shut down the job, clearly knew or should have known that Mr. Ibarra had failed to secure the area where he was working and by altering the scaffolding, Mr. Ibarra was in the process of creating a dangerous condition. Mr. Macias shouldn't have ignored Mr. Ibarra and should have checked on him.

As the foreman on the job, Mr. Mozqueda also represented or constituted the presence of management. His knowledge, however, is limited. While he made the assignment in the presence of Mr. Ibarra and Mr. Macias that the rest area be installed after lunch, he departed the job site immediately thereafter to inspect other Hirschi Masonry projects. Mr. Mozqueda had general knowledge of the working conditions, but being absent from the job site while Mr. Ibarra began to install the rest station, and alter the scaffolding, Mr. Mozquedas had no actual or constructiveknowledge of the manner in which Mr. Ibarra was working on the rest station other than the belief that inasmuch as Mr. Ibarra was a trained, competent person, he had confidence in Mr. Ibarra to do the right thing. Tr., pp. 49, 50 . Mr. Mozqueda had no knowledge as a member of management that Mr. Ibarra was ignoring the training he had received as a competent person for scaffolding purposes and that Mr. Ibarra created the conditions that caused the fall and injury to Mr. Barbosa.

CONCLUSIONS OF LAW

To the extent that the preceding discussion constitutes conclusions of law, they are incorporated herein.

The elements of a *prima facie* case showing a violation of OSHA law are well established.

> Pursuant to NAC 618.788, the Chief Administrative Officer of NOSHA carries the burden of proof in demonstrating a violation of OSHA law by establishing: (1) the applicability of the OSHA regulation; (2) noncompliance with the OSHA regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual or constructive knowledge of the violative conduct. *See Secretary of Labor v. Atl. Battery Co.*, 16 BNA OSHC 2131, 2135, 1994 WL 682922 (No. 90-1747, 1994). *Original Roofing Co., LLC v. Chief Admin. Officer of Occupational Safety & Health Admin.*, 135 Nev. 140, 143, 442 P.3d 146, 149 (2019).

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Then, if and only if, the State makes out its *prima facie* case, the employer is obliged to come forward and assert its affirmative defense, which is, in this case, the affirmative defense of un-preventable or unforeseeable employee misconduct. *ComTran Group, Inc., supra* at 1308; *see also, New York State Elec. & Gas Corp., supra* at 106-108 (noting that proof of an affirmative defense comes into play, only after proof of the *prima facie* case by the Secretary (here, the State)).

The elements of the un-preventable employee misconduct defense are also well established.

> [It]... requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered. *See id.* at 106 (citations omitted). *ComTran, supra* at 1308.

Here, it is undisputed that the State proved the first three elements of its *prima facie* case. The parties have agreed that 29 CFR Section 1926.451(b)(5)(ii) applies, that Mr. Ibarra did not comply with the regulation, and that an employee, Mr. Barbosa, was exposed to a dangerous condition. Consequently, inquiry is narrowed to whether the Hirschi Masonry had knowledge, and if so, whether Hirschi Masonry could prove its affirmative defense of un-preventable employee misconduct. *ComTran, supra* at 1311.

Employer knowledge is shown by proof the employer either knew or with the exercise of reasonable diligence, should have known of the violative condition. *Original Roofing, supra* at 143. Generally speaking, a supervisor's knowledge of the violative condition may be imputed to the employer. *Ibid.* "An employer's exercise of reasonable diligence includes the obligation to anticipate potential hazardous conditions, take measures to prevent those conditions, and to inspect worksites. *See, Pride Oil Well Serv.,* 15 BNA OSHC at 1814." *Ibid.*

A different situation arises for the imputation of knowledge, however, when the supervisor is also the miscreant. In that case, the supervisor's knowledge of his own misconduct may only be imputed to the employer when "... the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor." *Id.* at 143. That is to say, "'a supervisor's knowledge of his own malfeasance is not imputable to the employer where the

employer's safety, policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable.' W. G. Yates, 459 F.3d at 608." *Original Roofing, supra* at 144.

Original Roofing then provides a description of an employer training program for employees that led the Court to conclude that it was so thorough and comprehensive, it enabled the Court to conclude that it would be unreasonable to impute a miscreant supervisor's knowledge of his own misconduct to the employer to show employer knowledge. That is, the training was so comprehensive, it would be unforeseeable that a supervisor would conduct him or herself in such a manner as to violate OSHA law.

Applying these principles to the case before the Board, Mr. Mozqueda, Mr. Ibarra and Mr. Macias are the three candidates for the imputation of knowledge of the failure to follow procedure resulting in the serious injury to Mr. Barbosa. Taking Mr. Mozqueda, first, he was off site at the time of the incident. As a foreman, his duties would take him off site, to visit other jobs under his supervision. Not being present, he had no knowledge to impute to the employer, and was not in a position where he should have known of the failures of Mr. Ibarra, by exercising reasonable diligence to check on Mr. Ibarra's work. The Board concludes that he is no source for the imputation of knowledge to Hirschi Masonry.

Mr. Ibarra is a different story. He was the miscreant. He clearly knew of his short comings. The imputation of his own knowledge about his deviation from training hinges upon whether or not in light of the training he received, it would or would not be foreseeable that he could conduct himself in this manner. He concedes that he knew what he did was wrong. Was the training millieu sufficiently strong that it would be unreasonable to impute Mr. Ibarra's knowledge of his own misconduct to Hirschi because it would be inconceivable that Mr. Ibarra would be so lax in the observance of safety protocol to be followed when altering a scaffold?

Comparing and contrasting the description of training provided by Hirschi Masonry with the training given in *Original Roofing* that enabled the Court to conclude it would be unfair to impute the miscreant supervisor's knowledge of his own misdeeds to the employer, the training, here, pales in comparison. The culture of safety sought to be built by Original Roofing is far

more robust an effort beginning with proof, that Original Roofing spent $170,000 on safety programs. *Original Roofing, supra* at 144. Original Roofing also created a training facility equipped with a mock roof, to show employees how to anchor their fall equipment. There was also periodic training and retraining of personnel, safety audits were conducted, there was an incentive program to promote safety and the like. *Ibid.*

Here, while Hirschi Masonry presented evidence of its concern for safety, it could not produce written safety materials in Spanish, only English, even though it was clear Spanish speaking employees were a prevalent part of the workforce. There was no proof of the investment in safety made by Hirschi Masonry, much less that the company spent $170,000 on safety programs as did Original Roofing.

Also, there was no proof that the supervisors were trained, here, in how to be a supervisor in the first place. This might have been of assistance to Mr. Macias, as developed below, in helping him maintain control over Mr. Ibarra. There is some question, also, about the effectiveness of the training. For some, inexplicable reason, Mr. Ibarra thought that because no one else was around, he could ignore safety procedures. This is hardly emblematic of a culture of safety.

In short, the training program described in *Original Roofing* that made it unreasonable and unforeseeable to impute the miscreant supervisor's knowledge of his own wrong doing is not evident, here. Mr. Ibarra's knowledge of his own wrong doing may, the Board finds and concludes, be imputed to Hirschi Masonry.

This is true, however, also about Mr. Macias. There was no proof, he received any comprehensive doctrination into safety procedures in the workplace or a culture of safety. *Original Roofing* provides no bar to imputing Mr. Macias' knowledge to Hirschi Masonry.

He did not, himself, however, actually see the work being performed without safety measures by Mr. Ibarra. Mr. Macias was on the scaffold, within 50 feet of where Mr. Ibarra was working. As indicated, the two diagrams show Mr. Macias was in close proximity to Mr. Ibarra. Exhibit 1, pp. 30, 33. An employer may be held accountable, however, for what he knew or should have known about the workplace, as employer's are under a duty to exercise reasonable

diligence to affirmatively ferret out conditions in the workplace. *See, Original Roofing, supra* at 143. Mr. Macias falls under this doctrine. He clearly could have and should have known how Mr. Ibarra was going about his work. *See e.g., Secretary of Labor v. Hamilton Fixtures*, 116 O.S.H. Cas. (BNA) 1073, at * 17-19 (1993).

Thus, the Board finds and concludes that as the crew leader, responsible for the worksite in the absence of Mr. Mozqueda, foreman, Mr. Macias could have and should have exercised reasonable diligence, walked the 50 feet or so to where Mr. Ibarra was working, discovered Mr. Ibarra's disregard for safety measures and avoided the entire situation. The Board, therefore, finds and concludes that the information he would have and should have gleaned by exercising reasonable due diligence may be imputed to Hirschi Masonry.

Employer knowledge, the Board finds and concludes, is also established through Mr. Macias. Thus, the Board finds that the *prima facie* case is established by a combination of the stipulation of the parties as to the first three elements of a *prima facie* case and proof of knowledge imputed through Mr. Macias and Mr. Ibarra to Hirschi Masonry.

The question then becomes, whether Hirschi Masonry can prove un-preventable employee misconduct. Here, the Board was concerned with proof that Hirschi Masonry adequately communicated safety rules, took meaningful steps to discover violations and adequately enforced the safety rules. 2Tr., pp. 21-28. As indicated, the burden was on Hirschi Masonry to prove these three elements of the affirmative defense of un-preventable employee misconduct.

Proof of this affirmative defense was a close question. The failure of proof centered upon whether meaningful steps were taken by Hirschi Masonry to discover violations. Specifically, this element was questioned because Mr. Macias was left in charge of the job site at the time of the incident, when the foreman, Mr. Mozqueda, left Mr, Macias in charge. There was no direct evidence of the training given Mr. Macias to manage the job site. There is proof in the record, that at the time of the incident, through Mr. Macias was in the vicinity of the incident, he was not paying attention to Mr. Ibarra, the miscreant. Mr. Macias did not check on Mr. Ibarra, even though there was nothing in the record to prevent him from checking on Mr. Ibarra. Apparently, Hirschi Masonry will allow untrained and inattentive supervisors to manage the job site. Had Mr.

Macias been properly trained, it is conceivable that he would have managed Mr. Ibarra more closely and the incident avoided. Mr. Macias' role frustrates the un-preventable employee defense. It is predictable that supervision would be lax, if an untrained supervisor is placed in charge.

The communication element also was of grave concern because none of the printed, training materials were in Spanish, though a substantial part of the workforce was Spanish speaking, only. For this reason, members of the Board questioned the efficacy of communication. 2 Tr., pp. 13, 20, 21. Then, meaningful enforcement was also an issue. Hirschi Masonry provided evidence of discipline being meted out to employees, but there was no evidence, anyone at Hirschi was disciplined for a scaffolding violation apart from Mr. Ibarra. *See,* 2 Tr., p. 25. Either the scaffold employees were perfect in every way or Hirschi Masonry is lax in the enforcement of scaffolding violations. In either event, the burden is upon Hirschi Masonry, to show effective enforcement.

Two Board members, 2Tr., p. 36, believed that Hirschi Masonry had proved its affirmative defense, which would trump the *prima facie* case. 2Tr., p. 36 . Only four members sat to hear this case, and thus, an even split of the Board members results in a failure of proof of the affirmative defense inasmuch as Hirschi Masonry had the burden of proof, once a *prima facie* case has been shown.

The Board, therefore, concludes as a matter of fact and law that Citation 1, Item 1 must be affirmed. 29 CFR 1926.451(b)(5)(ii), the Board finds and concludes, was violated. The Board finds and concludes, further, that Hirschi Masonry failed in its burden of proving its affirmative defense of un-preventable employee misconduct. Furthermore, inasmuch as the first three elements of the *prima facie* case were stipulated to, no challenge was levied to the serious classification of the offense, its gravity, the probability of reoccurrence, the extent of the violation, prior history of offenses and the like. The Board is not inclined to meddle with those findings by the State where there is no quarrel over them, and hereby, affirms the penalty assessed of $7,000 which the respondent, Hirschi Masonry, LLC, is ordered to pay. Hirschi Masonry is also hereby ordered to abate the violative conditions if any remain.

DECISION

It was moved by Rodd Weber, seconded by Frank Milligan, to sustain Citation 1, Item 1 of the State's Complaint and to grant all of the relief prayed for by the State in its Complaint, requiring Hirschi Masonry, LLC, therefore, to pay the fine assessed of $7,000 and to abate all violative conditions if any remain. Motion adopted. Vote: 4-0.

It was then moved by Rodd Weber, seconded by Chairman Ingersoll, to affirm the affirmative defense of un-preventable employee misconduct. The motion failed on a vote of two in favor of the defense and two against, with the Chairman Ingersoll and Secretary Weber voting in favor of the motion. As the burden of proof of the affirmative defense is with the employer, Hirschi Masonry, and the motion failed to approve the affirmative defense, no affirmative defense has been shown. Citation 1, Item 1 is hereby sustained.

ACCORDINGLY, it is HEREBY ORDERED that Citation 1, Item 1, is affirmed. Respondent Hirschi Masonry is hereby assessed a penalty of $7,000 which it is Ordered to pay. Hirschi Masonry is also HEREBY ORDERED to immediately abate the violated condition.

Finally, the Board HEREBY CERTIFIES that this Decision constitutes the Final Order of the Board of Review, subject to appeal by the parties hereto.

On January 13, 2021, 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 Frank Milligan, the Board voted 4-0, 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.

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On January 13, 2021, this Decision is, therefore, hereby adopted and approved as the Decision of the Board of Review and the Final Order of the Board of Review.

Dated this 17th day of ~~January~~ February, 2021.

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, *Findings of Fact, Conclusions of Law and Decision of the Board*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail/return receipt requested, and U.S. Mail, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:

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Dated this 12th day of February, 2021.

Karen Kennedy
An employee of
the Law Offices of Charles R. Zeh, Esq.

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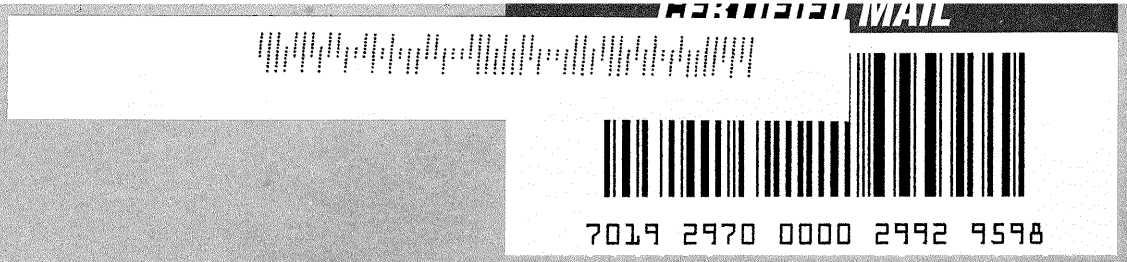

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