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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.

FOCUS FRAMING, DOORS AND TRIM,
LLC

Respondent.

Docket No. LV 21-2108

Inspection No. 1483817

FILED
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OSH REVIEW BOARD
BY Chenney

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

This matter arose while Focus Framing, Doors and Trim, LLC, (Focus Framing or the Respondent) was putting a roof on a residence in a construction project known as Saddlebrook by KB Homes. *See*, State's Exhibit 1, pp. 4, 9. The alleged violation came to the attention of OSHA by self-referral, the Respondent made a mandatory report of an on-the-job injury. *See*, State's Exhibit 1, p. 4. The injury occurred while one of the Respondent's employees, Inez Urzua, was working on the southwest corner of the second story roof of a two-story residence. *See*, State's Exhibit 1, pp. 4, 9. Mr. Urzua fell approximately 7 feet onto the roof of the lower level of the residence. *See, Id.* As the result of this fall, Mr. Urzua fractured one of his ribs and suffered contusions to other areas of his body. *See, Id.*

This matter came on for hearing before the Nevada Occupational Safety and Health Board of Review on September 8, 2021, in furtherance of a notice duly provided according to law. *See*, Notice of Hearing dated March 23, 2021. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial

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1 Relations (the State). *See*, Tr., p. 9;16.¹ Michael P. Merseh, Esq., appeared on behalf of Focus
2 Framing, Doors and Trim, LLC, (Focus Framing or the Respondent). *See*, Tr., p. 5;12-15.

3 In attendance at the September 8, 2021 hearing were Board Chairman Rodd Weber, Board
4 Secretary William Speilberg, Board Members Frank Milligan, Jorge Macias and Scott Fullerton. *See*,
5 Tr., p. 1. There being five members of the Board present to hear this matter with at least one member
6 representing management and one member representing labor in attendance, a quorum was present to
7 hear the matter and conduct the business of the Board. Charles R, Zeh, Esq., The Law Offices of
8 Charles R. Zeh, Esq., was present as legal counsel to the Board. *See*, Tr., p. 1.

9 On December 7, 2020, the Citation and Notification of Penalty (Citation), alleging a violation
10 of 29 CFR 1926.502(d)(16)(iii) was issued. *See*, State's Exhibit 1, pp. 28-38. The Citation alleged
11 that Focus Framing failed to ensure its employees did not fall more than 6 feet or onto a lower
12 surface. *See*, State's Exhibit 1, pp. 22, 23. Citation 1, Item 1, charged a repeat-serious violation of
13 29 CFR 1926.502(d)(16)(iii), as stated below:

14 Personal fall arrest systems, when stopping a fall, shall be rigged such that an
15 employee can neither free fall more than 6 feet (1.8 m), nor contact any lower
level.

16 The employer did not ensure that an employee wearing a personal fall arrest system
17 was unable to free fall more than 6 feet nor contact a lower level when the system
18 was stopping a fall. On June 23, 2020, an employee was working at Lot 49 on a
19 residential construction project and was utilizing a personal fall arrest system that
20 consisted of: a Werner AutoCoil 2 Fall Protection self-retracting lifeline (model:
21 R2130), a full body harness (model: Unknown), and an anchor plate (Model:
22 Unknown). The self retracting lifeline was payed out approximately 26.5 feet to the
south west corner of the home as the employees (sic) was installing plywood
material on the roof. Due to how the system was rigged, when the employee
slipped and fell approximately 7 feet, he landed on the peak of the lower-level roof
above the front door. As a result of the fall, the employee sustained a fracture to
their (sic) ribs and multiple contusions to their (sic) body. *See*, State's Exhibit 1, p.
22.

23 On January 11, 2021, the Respondent sent its notice of intent to contest the Citation. *See*,
24 State's Exhibit 1, p. 39. On January 28, 2021, the State filed and served its Complaint on the
25 Respondent. *See*, State's Exhibit 1, pp. 40-45. On February 12, 2021, Mr. Merseh answered the
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¹"Tr." stands for the transcript of the hearing conducted on September 8, 2021, followed by the page and line number where the matter cited can be found.

1 Complaint for the Respondent. *See*, State's Exhibit 1, pp. 44-48. Therein, no affirmative defenses
2 were offered.²

3 At the hearing on the matter, the State offered for admission its Exhibits numbered 1 through
4 3, consisting of a total of 109 pages. *See*, Tr., p. 9;16-21. The Respondent did not object to the
5 admission of the State's Exhibits 1 through 3. *See*, Tr., pp. 9;23-24, 10;1. The State's Exhibits
6 numbered 1 through 3 were subsequently admitted. *See*, Tr., p. 12;7-12.

7 The Respondent offered three documents for admission. *See*, Tr., p. 10;4-14. The first was
8 entitled, Focus Framing Exhibits consisting of 122 pages plus a two-page table of contents
9 (hereinafter referred to as Respondent's Exhibit 1). *See, Id.* Second, the Respondent offered a
10 document entitled 2018 to 2020 Focus Framing Safety Training Logs for Inez Yovani Urzua. This
11 document consisted of 86 pages plus a three-page table of contents (hereinafter referred to as
12 Respondent's Exhibit 2). *See, Id.* Third, the Respondent offered a document entitled 2021 Focus
13 Framing Safety Training Logs for Inez Yovani Urzua. This document consisted of 72 pages plus a
14 two-page table of contents (hereinafter referred to as Respondent's Exhibit 3). *See, Id.*

15 The State objected to pages 2 through 15 and pages 31 through 82 of the Respondent's
16 Exhibit 1. *See*, Tr., p. 10;17-2. The State objected to pages 1 through 26 and pages 30 through 86 of
17 the Respondent's Exhibit 2. *See*, Tr., pp. 10;23-24, 11;1-5. The State objected to all of the
18 Respondent's Exhibit 3. *See*, Tr., p. 11;6-11. The State's objections to the Respondent's exhibits
19 were overruled later in the proceedings. *See*, Tr., p. 189;18-24. Jurisdiction in this matter has been
20 conferred in accordance with Chapter 618 of the Nevada Revised Statutes.

21 Before any testimony was given, the State amended the Citation from repeat-serious to
22 serious. *See*, Tr., p. 14;4-8. As a result of this amendment, the total penalty assessed against the
23 Respondent was reduced to \$9,639 from \$53,015. *See*, Tr., p. 43;3-12. Thereafter, the State presented
24 the testimony of Dewaune James, Inez Urzua and Marino Ochoa. *See*, Tr., p. 2. Focus Framing
25 presented the testimony of its Safety Director, Nicholas Poa. *See*, Tr., p. 2.

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²The Respondent was allowed to raise the defense of unavoidable employee misconduct at the hearing, regardless of its failure to raise this affirmative defense in the Answer. *See*, Rule 8(c)(1), NRC.P.

1 **FINDINGS OF FACT**

2 Focus Framing is a Nevada limited liability company based in Las Vegas, Nevada. *See*,
3 State's Exhibit 1, pp. 1, 2. At the time of the occurrence of the alleged violation, the Respondent was
4 a subcontractor for KB Homes. *See*, State's Exhibit 1, p. 4. In this instance, Focus Framing was
5 putting a roof on a two-story residence located at 6836 N. Rustic Grasslands Street, Las Vegas,
6 Nevada. *See, Id.*

7 This was a large residence. The length of the west side first level from the high pitch roof to
8 beginning of the west side was approximately 35 feet. *See*, State's Exhibit 1, p. 69, *see also*, Tr., p.
9 31;18-24. The roof measured about 25 feet from the side of the high level pitch of the roof to the
10 front of the west side of the home. *See*, State's Exhibit 1, p. 63, *see also*, Tr., p. 30;9-13. The
11 distance from the second story roof to the first story roof was 10 feet 7 inches. *See*, State's Exhibit 1,
12 pp. 55-56, *see also*, Tr., p. 29;1-6.

13 On the evening of June 23, 2020, Mr. Urzua was sheathing the southwest corner of the
14 residence's second story roof. *See*, State's Exhibit 1, pp. 17, 51, *see also*, Tr., p. 28;8-10. Mr. Urzua
15 lost his balance and fell off of this roof. *See*, State's Exhibit 1, p. 4. Mr. Urzua was using a personal
16 fall arrest system (PFAS) at the time of his fall. *See, Id.* However, due to the location of the anchor
17 point at the top of the roof, he fell approximately 7 feet, impacting the roof over the entrance to the
18 residence. *See*, State's Exhibit 1, pp. 16, 51.

19 At the time of his fall, Mr. Urzua's harness was attached to an anchor point with a Werner
20 Fall Protection Self Retractable Lifeline (Model: R2130 Series. AutoCoil 60 Fr)(Retractable). *See*,
21 State's Exhibit 1, p. 24, *see also*, State's Exhibit 3, pp. 98-109. The anchor point for Mr. Urzua's
22 PFAS was located at the highest point of the second story roof on the center line. *See*, State's
23 Exhibit 1, p. 51. Accordingly, Mr. Urzua's vertical fall was, or would have been, about 10 feet.
24 However, as the result of the diagonal distance between the anchor point and Mr. Urzua's location
25 on the southwest corner of the second story roof, he swung into the roof above the entrance on the
26 first floor. *See*, State's Exhibit 1, p. 51. Mr. Urzua's Retractable engaged when the device registered
27 his fall. *See*, Tr., pp. 166;24, 167;1-3. Without his PFAS, Mr. Urzua would have fallen 24 feet to the
28 ground. *See*, Tr., p. 175;11-14.

1 The photograph (State's Exhibit 1, p. 51) provides an excellent visual representation of the
2 event. Arrow # 1 provides the location of Mr. Urzua's anchor point at the highest point of the second
3 story roof on the center of the roof line. *See, Id.* Arrow # 2 points to the southwest corner of the
4 residence, the place from which Mr. Urzua fell. *See, Id.* The photograph showed the distance from
5 the anchor point to the southwest corner of the roof and, also, the significant amount of Retractable
6 line which needed to be payed out across the second story roof. *See, Id.* In fact, Mr. Urzua's
7 Retractable was payed out approximately 26.5 feet from the anchor point to the southwest corner of
8 the roof. *See, Id.* Arrow #3 points to first floor roof which Mr. Urzua impacted. *See, Id.* Thus, it is
9 easy to see how Mr. Urzua's fall from the southwest corner of the second story roof allowed him to
10 swing into the residence's lower roof.

11 This type of fall is known as a swing fall or the pendulum effect. It occurs when a PFAS is
12 anchored at an angle, *i.e.*, not directly above the wearer. Should that person fall, he or she would
13 swing like a pendulum, toward the anchor point and away again. In the process, the person could
14 strike the structure from which he or she fell or another nearby structure.³

15 The User Instructions for the Werner Self Retracting Lifeline discussed fall risk while using
16 its PFAS.

17 Verify that adequate clearance exists below the work area and there are no objects or
18 obstructions below the work area that the user could contact in the case of a fall. *See,*
State's Exhibit 3, p. 103.

19 This discussion continued to explain the risk of swing falls:

20 Contact with a lower level can occur even when this equipment is in perfect
21 operating condition if there is any object in the path of the fall or if the height of
22 the anchorage being used is inadequate. The fall distance can vary according to the
23 connecting subsystem used. The [] diagram [on the following page] indicates
typical clearance calculations for self-retracting lifelines. *See, State's Exhibit 3, p.*
106.

24 The diagram provided examples of fall distances from two heights, 10 feet and 12.5 feet. *See, Id.* In
25 both instances, the persons with the lifeline anchored directly above them had more clearance than
26 the ones whose lines were at an angle. *See, Id.*

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³*See, simplifiedsafety.com/blog/swing-fall-hazards-and-how-to-prevent-them/*

1 The Respondent's plan to prevent swing falls was referred to as the 30 degree rule. *See*,
2 Respondent's Exhibit 1, p. 85, *see also*, Tr., p. 193;1-5. Succinctly stated, the Respondent forbid its
3 employees from anchoring their lifelines at an angle of more than 30 degrees. *See*, Tr., p. 162;3-11.
4 Should the employee be working at a place where the angle exceeded 30 degrees, the employee was
5 required to move the anchor point closer to the work area. *See*, Tr., pp. 134;14-24, 162;3-11. As

6 Nicholas Poa explained:

7 [T]he reason ... [Mr. Urzua] contacted the lower level is because he was
8 overextended past the 30 degrees... if his anchor point was right up above him,
9 directly above him then if he would have fell he would have fell and he would
have been hanging in suspension on the side of the house. *See*, Tr., p. 196;14-19.

10 At the start of the day of the accident the foreman, Mr. Ochoa, assigned Mr. Urzua the task of
11 placing plywood over the entire second story roof. *See*, Tr., pp. 119;14-7, 122;2-5. This assignment
12 naturally placed Mr. Urzua on the southwest corner of the second story roof. *See*, Tr., p. 122;6-9. At
13 the start of the day, the anchor point was in the center of the second story roof of the residence. *See*,
14 Tr., pp. 120;20-24, 121;1-8, 125;22-24. At the end of the day, the anchor point was, most likely, in
15 that same spot.⁴ *See*, Tr., pp. 139;19-24, 140;1.

16 After the accident, Mr. Urzua was hospitalized overnight. *See*, Tr., p. 157; 2-6. Mr. Urzua
17 initially returned to work on light duty. *See*, Tr., pp. 167;24, 168;1-11. Mr. Urzua was given a full
18 release to come back to work 39 days after the incident. *See, Id.* Mr. Urzua was formally disciplined
19 for the incident on September 30, over 90 days after the accident. *See*, Tr., p. 203;6-11. This was one
20 day after the Respondent was notified that a citation would be issued. *See*, State's Exhibit 1, p. 18,
21 *see also*, Tr., p. 34;2-5. The Respondent explained that the delay in providing the formal discipline to
22 Mr. Urzua was the result of his slow recovery from his injuries. *See*, Tr., pp. 167;24, 168;1-11.
23 Further, Mr. Urzua would have received the disciplinary notice regardless of the issuance of the
24 citation. *See*, Tr., pp. 204;19-24, 205;1-11.

25 At the hearing on the matter, Mr. James testified that he believed that Focus Framing used the
26 wrong equipment. *See*, Tr., pp. 46;13-24, 47;1-15. The Retractable actually added to the distance the
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28 ⁴Conflicting statements were provided as to whether the anchor point was moved on the day of the
incident. *See*, Tr., pp. 123-126, 138;14-24.

1 employee would fall, should he fall. *See*, State's Exhibit 3, p. 107. This created an additional hazard
2 in this residence because the roof over the entrance was 7 feet below the southwest corner of the
3 residence. *See*, State's Exhibit 1, p. 53. This additional fall distance increased the risk that the
4 employee would collide with the lower floor's roof.

5 Mr. James also testified to the State's calculation of the gravity based penalty. *See*, Tr., pp.
6 41-43. The preliminary penalty amount was a function of the gravity of the violation and probability
7 of injury from the violation. *See, Id.* Mr. James explained that this preliminary penalty amount was
8 calculated to be \$9,639. *See*, State's Exhibit 1, p. 23. The Respondent did not object to any of Mr.
9 James' testimony regarding the penalty calculation. Further, Focus Framing did not pose any
10 substantive questions regarding the penalty calculation during its cross-examination of Mr. James.

11 Mr. Urzua testified that he was trained to move the anchor point for his PFAS as needed to
12 prevent a swing fall. *See*, Tr., pp. 95;14-17, 97;18-23. Further, he testified that he had chosen not to
13 move the anchor for his own convenience. *See*, Tr., p. 96;4-22.

14 Focus Framing's witness, Mr. Poa, testified regarding, *inter alia*, the Respondent's Safety
15 and Hazard Communications Program (Safety Program). *See*, Respondent Exhibit 1, pp. 31-82.
16 Specifically, Mr. Poa testified to the Respondent's fall safety program. *See*, Respondent's Exhibit 1,
17 p. 49, *see also*, Tr., p. 171;2-6. Conspicuous in its absence was any discussion of swing falls and/or
18 the 30 degree rule. *See, Id.* Mr. Poa explained this omission by informing the Board that those topics
19 were part of Focus Framing's training and were included in its instructional videos. *See*, Tr., p.
20 171;9-22.

21 On cross examination, Ms. Ortiz pointed to several deficiencies in the Respondent's Safety
22 and Hazard Communications Program:

23 Ms. Ortiz: Could you please point us to the written rule that was broken by Mr. Urzua
24 in this case.

25 Mr. Poa: As far as anchor points?

26 Ms. Ortiz: Your written safety program which I believe starts at the Employer's
27 Number 32. Could you point us to a rule relating -- how to properly rig this
28 equipment.

Mr. Poa: I do not think it's written in there, but it's part of our constant training
program of locating anchors that are, and that they work within the 30-degree angle
from the center point of their anchor.

1 Ms. Ortiz: Can you point us anywhere in your written safety program about who is
2 responsible for checking the personal fall arrest systems before use?

3 Mr. Poa: As far as it being in the written safety program I can't point it out right now,
4 but I can state our training program consists of the employees responsible for reading
5 the instructions of their equipment

6 Ms. Ortiz: Can you point anywhere in your safety program that talks about the
7 specific procedures that address the rigging of personal fall arrest systems on
8 multilevel residential constructions?

9 Mr. Poa: I don't think that's -- I don't think it's in there. *See*, Tr., pp. 198-200.

10 A final thing to which Mr. Poa testified was Focus Framing's use the Werner Retractable in all
11 instances. *See*, Tr., p. 197;13-19.

12 It should be noted that Focus Framing's logs for the time period before the accident contained
13 sign in sheets documenting Mr. Urzua's attendance at swing factor training. *See*, Respondent's
14 Exhibit 2, pp. 15, 16, 47, 48, 51, 52, 57, 58, 75, 76, 77, 78. These logs also showed that Mr. Urzua
15 has attended several training sessions regarding the placement of anchor points. *See*, Respondent's
16 Exhibit 2, pp. 7, 8 17, 18, 30, 31, 35, 36, 45, 46, 49, 50 61, 62, 71, 72, 73, 74, 81, 82. However,
17 neither the State nor the Board were supplied with any of the substantive material for this training.
18 Therefore, the Respondent did not provide evidence that it had rules reasonably calculated to prevent
19 swing falls. Further, the Respondent did not have explicit rules requiring its employees to
20 appropriately anchor their lanyards.⁵

21 Member Fullerton's examination of Mr. Poa pointed out the deficiency of the 30 degree rule
22 as applied to this particular instance. Board Member Fullerton explained:

23 The 30-degree angle that this guy [was] allowed to go with would have put him on
24 multiple occasions that would have given him almost a 16-foot to either side pass
25 there to swing into that roof no matter what he did. He should have never left more
26 than perpendicular. *See*, Tr., p. 206;19-23.

27 ⁵The Respondent argued that it shouldn't be required to "read the mind of the department to know
28 that it needed to provide videotapes of all the training that we did or that somehow we need to memorialize
every last minutia into writing." *See*, Tr., p. 228;9-12. This argument misses the point that the defense of
unavoidable employee misconduct requires that the employer provide evidence that it has established work
rules designed to prevent the violation. *See, Sanderson Farms, Inc. v. OSHRC*, 348 Fed.Appx. 53, 57 (5TH
Cir., 2009).

1 In fact, had Mr. Urzua followed the 30 degree rule, moving the anchor point to a location
2 exactly 30 degrees from the southwest corner of the roof, the outcome would have been largely the
3 same. As Board Member Fullerton explained:

4
5 [O]n a 25-foot length roof of a 30-degree angle at the top is going to give you 15 feet
6 off to the side which is roughly 28 feet eight inches of the length... which would have
put him almost in the exact same spot he was when he fell off the roof. *See, Tr., p.*
206;11-17.

7 Board Member Fullerton also explained that the other prong of 29 CFR 1926.502(d)(16)(iii)
8 would have been implicated had Mr. Urzua not hit the trusses of the first floor roof.

9 Had the [first floor] roof not been there or had he been working on the far side of the
10 house where there is no lower level we might not have had impact with anything, but
we would have had an individual fall probably 10 to 15 feet. So we would have seen
11 possibly a different type of injury if there was one there. Because when you get on a
roof that big at a 30-degree angle...you're about 28 feet -- 28 and a half, almost 29 feet
12 out from perpendicular [] which would have caused Mr. Urzua to impact... multiple
things at that point. *See, Tr., pp. 233;22-24, 234;1-8.*

13 A final problem for the Respondent was that the use of retractable harnesses, increased the
14 fall distance and, therefore, the risk of injury. This was because some amount of line has to pay
15 through the Retractable before the mechanism engages to stop the employee's fall. Member Fullerton
16 brought this out during the hearing:

17 Member Fullerton: [T]he concept of these safety straps basically work like a
18 seatbelt, you can correct me if I'm wrong, but once you fall it doesn't lock until it
reaches a quick release of something. And at the rate he fell he technically would
19 have fallen more than six-foot and that started his swing before that thing locked
and then swung him.

20 Mr. Poa: And swung him, correct. *See, Tr., p. 210;16-23.*

21 Unfortunately for the Respondent, the evidence showed multiple deficiencies in its Safety
22 Program. First, Focus Framing was unable to provide documentation of its rules to require proper
23 rigging of anchor points. *See, Tr., pp. 198;22-24, 199;1-6.* Second, even if the Respondent's
24 employee's followed the 30 degree rule, they would not necessarily be protected from swing falls.
25 *See, Tr., p. 206;11-23.* Third, regardless of whether the employee went into a swing fall, he or she
26 would still fall further than six feet. *See, Tr., pp. 233;22-24, 234;1-8.* Fourth, the employer's choice
27 for the attachment to its harnesses made the problem worse. *See, Tr., p. 210;16-23.* Lastly, the

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1 Respondent relied entirely on retractable devices as part of their PFAS, even when other devices
2 would have worked better. *See*, Tr., p. 197;13-19.

3 CONCLUSIONS OF LAW

4 In this case, the burden is on the State to prove its *prima facie* case against Focus Framing by
5 a preponderance of the evidence. *See*, NAC 618.788(1), *see also*, *Original Roofing Company LLC v.*
6 *Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev. 2019). The State is
7 obligated to demonstrate the alleged violation by a preponderance of the reliable evidence in the
8 record. Findings must be based upon the kind of the evidence which responsible persons are
9 accustomed to rely in serious affairs. Mere estimates, assumptions and inferences fail this test.
10 Conjuncture is also insufficient. Findings must be based upon the kind of the evidence which
11 responsible persons are accustomed to rely in serious affairs. *See*, *William B. Hopke Co., Inc.* 1982
12 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision
13 must be based on consideration of the whole record and shall state all facts officially noticed and
14 relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958
15 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F.2d 464
16 (2nd Cir., 1975).

17 Pursuant to NAC 618.788, the States carries the burden of proof in demonstrating a violation
18 of OSHA law by establishing: (1) the applicability of the OSHA regulation; (2) noncompliance with
19 the OSHA regulation; (3) employee exposure to a hazardous condition; and (4) the employer's actual
20 or constructive knowledge of the violative conduct. *See*, *Original Roofing Co., LLC v. Chief Admin.*
21 *Officer of Occupational Safety & Health Admin.*, 135 Nev. 140, 143, 442 P.3d 146, 149 (2019);
22 *Secretary of Labor v. Atl. Battery Co.*, 16 BNA OSHC 2131, 2135, 1994 WL 682922 (No. 90-1747,
23 1994).

24 The standard of 29 CFR 1926.502(d)(16)(iii) applied because it deals with the proper rigging
25 of the Respondent's employees' PFAS. The Respondent violated the standard. The Respondent did
26 not ensure that Mr. Urzua's PFAS was rigged to prevent a free fall of more than six feet or contact
27 the lower level. That's exactly what happened, Mr. Urzua fell from the roof and contacted the lower
28 level. *See*, State's Exhibit 1, p. 21. While the occurrence of an accident is evidence of a violation of

1 the regulatory standard it is not *per se* proof that the standard was violated. *See, Koppers Co., Inc.*, 1
2 OSAHRC 666 (O.S.H.R.C. 1972); *Secretary of Labor v. American Roof Slab Company, Inc.*, 1
3 OSAHRC 481 (O.S.H.R.C.A.L.J. 1972). Instead, the State must offer evidence establishing that
4 circumstances existed in the workplace which were likely to give rise to the alleged hazard. *See,*
5 *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 63-67 (2nd Cir., 1983).

6 Here, Focus Framing lacked definitive procedures which specifically address the rigging of
7 PFAS on multilevel residential construction projects. *See, Tr.*, p. 198;20-24. Focus Framing failed to
8 show that its safety program had rules specifically applicable to the use of PFAS. *See, Tr.*, pp.
9 199;7-24, 200;1-21. The Respondent's rules did not designate responsibility for checking its
10 employees' PFAS. *See, Tr.*, pp. 53;24, 54;1-5. The Respondent did not have a rule designating who
11 is responsible for checking that the PFAS are rigged correctly. *See, Tr.*, p. 54;6-9. The Respondent
12 had no articulable rules or system to require an employee to relocate the anchor point as they crossed
13 the roof. *See, Tr.*, p. 211;14-24.

14 Additionally, the Respondent's system ignored the manufacturer's User Instructions. *See,*
15 State's Exhibit 3, pp. 106, 107. The User Instructions illustrated fall distances from two heights, with
16 and without swing hazard. *See, Id.* The Respondent ignored the additional fall distance requirement
17 where anchor point was not directly over above the employee. *See, Id.*

18 Another concern was that Focus Framing uses the same PFAS regardless of the project. *See,*
19 *Tr.*, pp. 182;19-24, 183;1-2. Most problematic, was that the accident was likely to have occurred
20 regardless of the employee's compliance with the 30 degree rule. *See, Tr.*, pp. 206-211.

21 The knowledge element can be established by demonstrating "that the employer either knew
22 or with the exercise of reasonable diligence, could have known of the presence of the violative
23 condition." *Original Roofing Co., LLC v. Chief Admin. Officer of Occupational Safety & Health*
24 *Admin., supra* a 149, quoting *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 86-692, 1992).
25 In this instance, the State produced evidence that the Respondent had actual knowledge of a volative
26 condition, *i.e.*, Focus Framing did not ensure that its employee's PFAS were rigged so as to prevent a
27 free fall of more than six feet or to prevent contact with a lower level. *See, Tr.*, p. 220;4-9.

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1 Actual knowledge of the violative condition was provided by the Respondent's foreman, Mr.
2 Ochoa. He assigned Mr. Urzua the task of sheathing the roof on the day of the accident. *See*, State's
3 Exhibit 1, pp. 19, 20, *see also*, Tr., pp. 119;18-21, 122;2-5. Mr. Ochoa knew they were putting
4 plywood on the entire the roof including the southwest corner of the roof. *See*, Tr., p. 122;2-5. This
5 spot was 26.5 feet from Mr. Urzua's anchor point. *See*, State's Exhibit 1, p. 63.

6 Mr. Ochoa checked the anchor points at the beginning of the day. *See*, Tr., p. 122;6-9. Mr.
7 Ochoa saw anchor point at the center of the second story roof being used at the beginning of the day.
8 Mr. Ochoa testified that it was moved during the day. *See*, Tr., pp. 125;22-24, 126;1-8. However, he
9 believed it to have been in the original spot when he departed the job site at 5:00. *See*, Tr., pp.
10 139;19-24, 140;1.

11 The State also provided evidence that the Respondent had constructive knowledge. *See*, Tr.,
12 pp. 69;8-24, 70;1-9. Werner Retractable's User Instructions explained that there must be 2 feet of
13 clearance from the hazard. *See*, State's Exhibit 1, pp. 106, 107. The User Instructions explain swing
14 fall hazards and the need for more clearance when the anchor point is on an angle. *See*, State's
15 Exhibit 1, pp. 106, 107. The warning that Mr. Urzua received from the Respondent illustrates this
16 hazard. *See*, Respondent's Exhibit 1, p. 84. For the retractable system to be safe, to prevent a
17 violation, it would need to be nearly straight above (no angle) the employee. *See*, Tr., p. 206;18-23.

18 As the State provided evidence in support of its *prima facie*, the Respondent needed to refute
19 this finding by showing, by a preponderance of the evidence, that the employee's conduct was a
20 result of unpreventable employee misconduct. *See*, *Jensen Construction, supra*, at 28,694 (1979);
21 *Sanderson Farms, supra*, at 57. If proven, employee misconduct would be a complete defense to the
22 charge brought against the Respondent. *See*, *TNT Crane & Rigging, Inc. v. Occupational Safety &*
23 *Health Rev. Comm'n*, 74 F.4th 347, 359 (5th Cir. 2023); *Angel Bros. Enterprises, Ltd. v. Walsh*, 18
24 F.4th 827, 832 (5th Cir., 2021). While the burden of proof rests with OSHA under Nevada law (NAC
25 618.788) to prove a *prima facie* case, after OSHA has proven the *prima facie* case, the burden shifts
26 to Focus Framing to prove the alleged unpreventable employee misconduct. *See*, *Jensen*
27 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664, p. 28,694 (1979); *Sanderson Farms, supra*,
28 at 57.

1 The elements of the affirmative defense of unpreventable employee misconduct are well
2 known. State Roofing must be able to prove by a preponderance of the evidence: 1) that the
3 employer has established work rules designed to prevent the violation; 2) has adequately
4 communicated those rules to his employees; 3) has taken steps to discover violations; and 4) has
5 effectively enforced rules when violations have been discovered. *See, Sanderson, supra* at 57; *Angel*
6 *Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir., 2021). However, if the employer does
7 not establish work rules designed to prevent the violation, the defense is unavailable. *See, PSP*
8 *Monotech Indus.*, 22 O.S.H. Cas. (BNA) ¶ 1303 at *4. (O.S.H.R.C. Aug. 14, 2008).

9 First, the Respondent must have a work rule that forbids the conduct. The Respondent did
10 not mandate procedures for its employees to use to properly rig the PFAS. *See, Tr.*, pp. 198-200.
11 Here, the Respondent had no written rules regarding the proper rigging of its employee's PFAS. *See,*
12 *Id.* There were no written rules regarding who was to check its employee's PFAS or how this was to
13 be done. *See, Id.* Finally, there were no written specific procedures addressing the rigging of personal
14 fall arrest systems on multilevel residential constructions. *See, Id.*

15 The second factor is that the Respondent had to effectively communicate the work rule. Here,
16 Messrs. Urzua and Ochoa both stated that they were trained regarding the importance of the proper
17 placement of anchor points. *See, Tr.*, pp. 95;14-17, 108;15-21, 133;4-10. Mr. Poa affirmed that its
18 rules were communicated in one or more videos and during employee training. *See, Tr.*, p. 171;9-22.
19 However, the Respondent failed to produce written documents setting forth these rules or the videos
20 which purportedly provided instruction of these safety procedures. *See, Tr.*, pp. 198-200.

21 The third factor is active enforcement or steps to discover violations. Mr. Ochoa provided
22 some testimony that would certainly argue in favor of that factor. *See, Tr.*, p. 141;17-24 142;1-2.
23 Adequate enforcement was also lacking. Mr. Pao testified that Mr. Urzua was out for 39 days on
24 temporary disability but he wasn't written up until 90 days after the accident. *See, Tr.*, p. 168;3-20.
25 Coincidentally, this was the day after the closing conference when the Respondent learned that a
26 citation would be recommended. *See, State's Exhibit 1*, p. 18. Mr. Pao testified that this was part of
27 the Respondent's abatement efforts and that Mr. Urzua would have been disciplined regardless. *See,*

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1 Tr., pp. 204;19-24, 205;1-11. However, enforcement cannot be considered particularly effective
2 when three months passes after the violation.

3 Accordingly, the Board found and concluded that Focus Framing's defense of unpreventable
4 employee misconduct fails. Therefore, the defense is not available to the Respondent to eliminate its
5 liability in this matter.

6 Board Member Macias moved to uphold the citation, as amended and further, affirming that
7 the Respondent had failed to prove its affirmative defense. *See*, Tr., p. 258;3-17. The motion was
8 seconded by Member Fullerton. *See, Id.* The motion was adopted upon a vote of 4 in favor of the
9 motion and 0 against the motion. *See*, Tr., p. 258;18-19. Member Milligan abstained because he had
10 missed part of the presentation of evidence. *See*, Tr., p. 323;17-24. The Board, by this motion,
11 authorizes the [former] Chairman, Rodd Weber [now Chairman, Jorge Macias], after any
12 grammatical or typographical errors are corrected in the Decision, to execute, without further Board
13 review, this Decision on behalf of the Board of Review.

14 On November 13, 2024 the Board convened to consider adoption of this Decision, as written
15 or as modified by the Board, as the decision of the Board.

16 Those present and eligible to vote on this question consisted of the 3 current members of the
17 Board, to-wit, Chairman Jorge Macias, Board Secretary William Spielberg and Board Member, Scott
18 Fullerton. Tyson Hollis and Gled Bautista were ineligible to vote. Upon a motion by William
19 Spielberg, seconded by Scott Fullerton, the Board voted 3-0-2 (Tyson Hollis and Gled Bautista
20 abstaining as they were not members of the Board or in attendance when the matter was decided), to
21 approve this Decision of the Board as the action of the Board and to authorize Chairman Jorge
22 Macias, after any grammatical or typographical errors are corrected, to execute, without further
23 Board review this Decision on behalf of the Nevada Occupational Safety and Health Review Board.
24 Those voting in favor of the motion either attended the hearing on the merits or had in their
25 possession the entire record before the Board upon which the decision was based.

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1 On November 13, 2024 this Decision is, therefore, hereby adopted and approved as the Final
2 Decision of the Board of Review.

3 Dated this 26th day of November, 2024.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

4
5
6 By:  _____
Jorge Macias, Chairman

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8
9 NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the Nevada
10 Occupational Safety and Health Review Board may file a petition for judicial review to the District
11 Court within thirty (30) days after service of this order.

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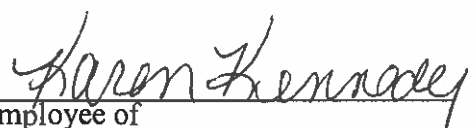
CERTIFICATE OF SERVICE

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 *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, 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

Michael P. Merseh, Esq.
1220 S. Commerce St. #120
Las Vegas NV 89102

Dated this 17th day of December, 2024.


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

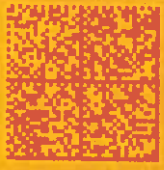
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