

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH

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2 REVIEW BOARD

3 AUG 16 2013

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5 CHIEF ADMINISTRATIVE OFFICER
6 OF THE OCCUPATIONAL SAFETY AND
7 HEALTH ADMINISTRATION, DIVISION
8 OF INDUSTRIAL RELATIONS OF THE
9 DEPARTMENT OF BUSINESS AND
10 INDUSTRY, STATE OF NEVADA

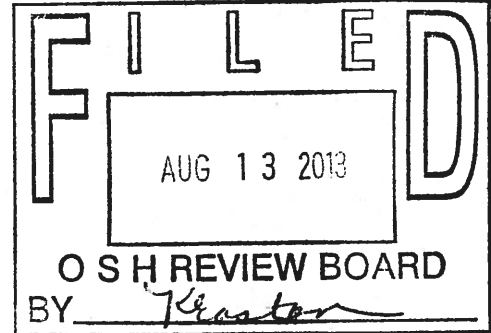
Docket No. LV 13-1652

11 Complainant,

12 vs.

13 WOODLAND FRAMING, INC.,

14 Respondent.



15 DECISION

16 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
17 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of July 2013,
18 in furtherance of notice duly provided according to law, MR. MICHAEL
19 TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief**
20 **Administrative Officer of the Occupational Safety and Health**
21 **Administration, Division of Industrial Relations (OSHA);** and MR.
22 CHRISTOPHER McCULLOUGH, ESQ. appearing on behalf of Respondent, **WOODLAND**
23 **FRAMING, INC.;** the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD**
24 finds as follows:

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

27 The complaint filed by the OSHA sets forth allegations of violation
28 of Nevada Revised Statutes as referenced in Exhibit "A", attached

1 thereto.

2 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b) (1)
3 as follows:

4 **Citation 1, Item 1, 29 CFR 1926.501(b) (1):** "Unprotected sides
5 and edges." Each employee on a walking/working surface
6 (horizontal and vertical surface) with an unprotected side or
7 edge which is 6 feet (1.8 m) or more above a lower level
8 shall be protected from falling by the use of guardrail
9 systems, safety net systems, or personal fall arrest systems.

10 At a construction site located at 6767 West Windmill Lane,
11 Las Vegas, NV, the employer, Woodland Framing, did not ensure
12 that employees working six (6) feet or more above the ground
13 were protected from a fall.

14 1. On February 19, 2013 two (2) employees were laying
15 down plywood sheeting on the roof of building number 5
16 which was a three story apartment complex. Employees
17 were working approximately twenty seven (27) feet above
18 the ground and were not protected from a fall by
19 guardrail systems, safety net systems, or personal fall
20 arrest systems. Employees were exposed to possible
21 serious injury from a fall hazard.

22 The violation was classified as "Serious". The proposed penalty
23 for the alleged violation is in the amount of THREE THOUSAND TWO HUNDRED
24 SEVENTY-TWO DOLLARS (\$3,272.00).

25 Complainant and respondent stipulated to the admission of
26 documentary evidence at complainant Exhibits 1 and 2 and respondent
27 Exhibit A.

28 Complainant presented testimony and documentary evidence with
regard to the alleged violation. Mr. Jeffrey Belcher, a certified
safety and health officer (CSHO) testified as to his inspection,
referenced his narrative report in evidence and the basis for the
citation issued to the respondent employer.

On February 19, 2013, at the Warmington Residential apartment
construction site, CSHO Belcher observed employees performing
construction work on the roof areas of a three story building. The

1 employees were installing plywood sheeting and standing on the roof of
2 the building. The structure was a three-story apartment complex
3 approximately 27 feet above the ground. Mr. Belcher observed the
4 employees wearing fall protection harnesses but there were no lanyards
5 attached to an anchor point. He identified the observed workmen as
6 employees of respondent Woodland Framing, Inc.

7 CSHO Belcher spoke with the respondent employee supervisor on the
8 job site, Mr. Rod Peters, who identified himself as the job foreman.
9 He interviewed Mr. Peters and asked why the employees subject of his
10 supervision were not wearing personal protective equipment (PPE) in the
11 form of attached harnesses. Foreman Peters initially responded he was
12 not aware of the conduct. Mr. Peters provided no recognized bases for
13 lack of PPE use but stated there was no way to perform the work if PPE
14 were worn. Mr. Belcher testified that he explained and warned Mr.
15 Peters of the safety dangers to his employees working without harnesses
16 attached to a lanyard.

17 On the following day, February 20, 2013, Mr. Belcher returned to
18 the site to conduct employee interviews. He observed foreman Peters
19 working approximately 15 above the ground without wearing any fall
20 protection. Mr. Peters then exited the roof site by stepping into the
21 "basket" attached to an all terrain forklift. The operator, identified
22 as respondent employee Andreas Rodriguez, drove the forklift with Mr.
23 Peters in the basket and lowered him to step off at the ground level.
24 When Mr. Peters stepped out of the forklift basket Mr. Belcher confirmed
25 he was not wearing fall protection of any kind as initially observed,
26 nor when he exited the forklift basket. CSHO Belcher asked Mr. Peters
27 why he was working without fall protection and then descended the area
28 in the basket of the forklift which are both OSHA violations. He

1 testified that ". . . Mr. Peters acted like there was nothing wrong with
2 what he did and . . . displayed a blatant disregard for safety . . .".
3 Mr. Peters informed CSHO Belcher there was nothing to tie off to while
4 he was working on the roof ledge and that he had to take down safety
5 rails so the next contractor could come in and install permanent stairs
6 and railings. As to descending and riding in the forklift basket, Mr.
7 Peters stated "I was kneeling in the corner . . . and didn't feel that
8 anything was wrong with what I did . . .".

9 CSHO Belcher met with Mr. Jeremy Chapman, owner of Woodland Framing
10 and reported his findings, particularly the conduct of foreman Peters.
11 Mr. Chapman responded that Mr. Peters had been doing this kind of work
12 for over 25 years and was ". . . one of the best and most knowledgeable
13 in the business . . .".

14 Mr. Belcher testified that he determined employer knowledge based
15 upon Mr. Peters being a supervisory employee as foreman on the site the
16 day of the inspections. During interviews Mr. Peters informed that he
17 is ". . . on the site every day and walks around to make sure the
18 employees are doing what they are supposed to and to make sure they do
19 not need anything . . .".

20 CSHO Belcher interviewed Mr. Andreas Rodriguez, the forklift
21 operator, who advised he (Rodriguez) was also responsible for making
22 sure the employees were wearing fall protection.

23 Mr. Belcher testified that he explained the necessity of fall
24 protection to Mr. Peters and Mr. Chapman during the first day of
25 inspection. When he returned the second day and found supervisor Peters
26 willfully violating the safety rules himself, he concluded that exercise
27 of reasonable employer diligence either directly, or through its
28 supervisory personnel, could have prevented the hazards which were

1 obvious and observed in plain view during the inspections. Mr. Belcher
2 testified as to appropriateness of the classification of serious given
3 the height of the potential fall; and correct calculation of the
4 penalties in accordance with the operations manual.

5 Mr. Kim Ecott, the respondent General Manager and safety officer,
6 informed Mr. Belcher that the subject employees not wearing PPE on the
7 day of the inspection were disciplined and assessed a monetary fine.
8 CSHO Belcher concluded there was no defense for employee misconduct
9 available. Foreman Peters was on the site daily. Two employees within
10 his view were not wearing PPE, which demonstrated lax enforcement of the
11 company safety policy. The CSHO concluded that because of Mr. Peters'
12 supervisory status, the knowledge of the violative conduct was imputed
13 under OSHA law to the employer. He further determined that foreman
14 Peters was himself wilfully violating the safety standards as
15 demonstrated by his own conduct working without a lanyard tie-off to his
16 harness on the second day, and descending the roof by riding in the
17 forklift basket.

18 On cross-examination CSHO Belcher testified he clearly informed Mr.
19 Peters on the first day of the inspection of the violative conditions
20 and what was required. He determined the conduct on the second day to
21 be a willful and flagrant violation of the safety requirements
22 proscribed in the cited OSHA standard. He testified the violation was
23 classified only as **serious** as opposed to **willful** because of the general
24 difficulties in proving the classification.

25 At the conclusion of complainant's case, respondent presented
26 testimony and documentary evidence. Mr. Kim Ecott identified himself
27 as the General Manager and safety officer for respondent with 31 years
28 industry experience. He inspects the company job sites daily to

1 identify safety issues, job progress, and anything else that may be
2 appropriate. If he sees a violation, he provides a verbal warning,
3 second a written warning, and on the third instance termination. He
4 testified the inspection report and citation were the first time he had
5 ever encountered a problem with Mr. Peters in 25 years of his (Peters)
6 employment. He testified as to the Woodland Framing company safety
7 policy identified in Exhibit A, 1 through 3.

8 On cross-examination Mr. Ecott testified there were 20 employees
9 working on the project on the day of inspection and all were under Mr.
10 Peters supervision such that it was difficult to monitor everyone.

11 Respondent concluded the case and both counsel presented closing
12 arguments.

13 Complainant asserted the required burden of proof was met to
14 establish a violation of the cited standard by a preponderance of
15 evidence. The photographs at Exhibit 2, 1 through 4, depicted employees
16 identified as those of the respondent engaged in work on the roof
17 structure more than six (6) feet above ground level without lanyard tie-
18 off or other compliance with the fall protection standard. The height
19 of the work and protection thresholds established applicability of the
20 standard and employee exposure to a potential fall at more than six
21 feet. The evidence was unrebutted. He argued the assessed penalty was
22 appropriate and reasonable. Employer knowledge was established by
23 imputation because Mr. Peters was the supervisory employee in charge of
24 safety at the worksite and failed to assure employees under his control
25 complied with the standard. Mr. Peters conduct on the second day of the
26 inspection by personally working without fall arrest protection then
27 descending the roof in the bucket of a forklift established his own
28 violation and demonstrated a disregard for safety compliance. The

1 violative knowledge is imputed to the respondent employer.

2 Respondent argued Exhibit 1, page 3, demonstrated the employer
3 maintained a safety program which the CSHO reviewed during the
4 inspection and found compliant. He asserted the CSHO testified that it
5 was beyond his imagination that Mr. Peters, a foreman, violated the
6 rules on the second day after the previous explanation and that fact
7 itself evidence of a lack of respondent foreseeability. He argued the
8 employee misconduct defense should apply because there were work rules
9 in place through the safety plan, there was evidence that discipline was
10 imposed on employees, and safety was adequately communicated in
11 furtherance of the testimony of Mr. Chapman. Respondent met the
12 elements to establish the recognized defense. He argued the employees
13 involved in the citation were terminated except Mr. Peters. The
14 incident was isolated; out of 20 employees only three were problematic
15 and terminated.

16 The board reviewed the evidence, and weighed the testimony provided
17 by the witnesses of complainant and respondent. The board finds a
18 preponderance of evidence to support violation of the cited fall
19 protection standard at Citation 1, Item 1.

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

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

23 All facts forming the basis of a complaint must be
24 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶
25 16,958 (1973).

26 To establish a prima facie case, the Secretary
27 (Chief Administrative Officer) must prove 1) the
28 cited standard applies; 2) the requirements of the
standard were not met; 3) employees were exposed to
or had access to the violative condition; 4) the
employer knew or, through the exercise of

1 **reasonable diligence could have known of the**
2 **violative condition;** 5) there is substantial
3 probability that death or serious physical harm
4 could result from the violative condition (in a
5 "serious" violation case). See *Bechtel*
6 *Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶ 18,906
7 (1974); *D.A. Collins Construction Co. Inc., v.*
8 *Secretary of Labor*, 117 F.3d 691 (2nd Cir. 1997).
9 (Emphasis added)

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

12 ". . . a serious violation exists in a place of
13 employment if there is a **substantial probability**
14 that death or **serious physical harm** could result
15 from a condition which exists or from one or more
16 practices, means, methods, operations or processes
17 which have been adopted or are **in use at that place**
18 **of employment unless the employer did not and could**
19 **not, with the exercise of reasonable diligence,**
20 **know the presence of the violation."** (Emphasis
21 added)

22 The testimony and evidence establish the existence of violative
23 conduct governed by the cited standard. Respondent presented no
24 evidence to refute or rebut the facts of violation, but asserted the
25 recognized defense of **isolated, unpreventable employee misconduct.**

26 Complainant's initial burden to prove the violation was met by the
27 unrebutted sworn testimony of CSHO Belcher, the inspection report,
28 including the narrative and interviews at Exhibit 1, and the photographs
29 in evidence at complainant Exhibit 2.

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

35 The defense (**unpreventable employee misconduct**) has
36 been stated in various ways, but it **basically**
37 **requires an employer to show that its employees**

1 were required to take protective measures that
2 would comply with the standard and it enforced that
3 requirement. *E.g.*, *Brock v. L.E. Myers Co.*, 818
4 F.2d 1270, 13 OSH Cases 1289 (6th Cir.), cert.
5 Denied, 484 U.S. 989 (1987); *Texland Drilling*
6 *Corp.*, 9 OSH Cases 1023 (Rev. Comm'n 1980). The
7 Commission has distilled its decisions as requiring
8 **four elements of proof**: that (1) the employer has
9 established work rules designated to prevent the
10 violation; (2) it has adequately communicated those
11 rules to its employees; (3) it has **taken steps to**
12 **discovery violations**; and (4) **it has effectively**
13 **enforced the rules when violations have been**
14 **discovered**. *E.g.*, *Capform Inc.*, 16 OSH Cases 2040,
15 2043 (rev. Comm'n 1994). Rabinowitz Occupational
16 Safety and Health Law, 2008, 2nd Ed., pages 156.

17 An employer has the **affirmative duty to anticipate and protect**
18 **against preventable hazardous conduct by employees**. *Leon Construction*
19 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976). **Employee misbehavior,**
20 **standing alone, does not relieve an employer**. Where the Secretary shows
21 the existence of violative conditions, an employer may defend by showing
22 that the employee's behavior was a deviation from a uniformly and
23 effectively enforced work rule, **of which deviation the employer had**
24 **neither actual nor constructive knowledge**. *A. J. McNulty & Co., Inc.*,
25 4 OSHC 1097, 1975-1976 OSHD ¶ 20,600 (1976). (emphasis added)

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

29 ". . . there is a similar doctrine of **supervisory**
30 **employee misconduct**, as a rebuttal of the
31 imputation to the employer of the supervisor's
32 knowledge. The Commission has stated that
33 involvement by a supervisor in a violation is
34 "**strong evidence that the employer's safety program**
35 **was lax.**" "Where a **supervisory employee** is
36 involved, the proof of unpreventable employee

1 misconduct is **more rigorous and the defense is more**
2 **difficult to establish since it is the supervisors'**
3 **duty to protect the safety of employees under their**
4 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases
5 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
6 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
7 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
8 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
9 Safety and Health Law, 2008, 2nd Ed., page 157.
10 (Emphasis added)

11 ". . . (A) **supervisor's knowledge** of deviations
12 from standards . . . is properly **imputed to the**
13 **respondent employer. . ."** *Division of Occupational*
14 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
15 775 P.2d 701 (1989). (emphasis added)

16 It is well settled that the **knowledge, actual or**
17 **constructive, of an employer's supervisory**
18 **personnel** will be imputed to the employer, unless
19 the employer establishes **substantial grounds** for
20 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
21 93 CCH OSHD ¶29,254 (No. 85-531 1991). The
22 Commission held that once there is a prima facie
23 showing of employer knowledge through a supervisory
24 employee, the employer can rebut that showing by
25 establishing that the failure of the supervisory
26 employee to follow proper procedures was
27 **unpreventable**. In particular, the employer must
28 establish that it had relevant work rules that it
adequately communicated and effectively enforced.
Consolidated Freightways Corp., 15 BNA OSHC 1317,
1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).

19 **Employer knowledge, foreseeability, and lack of safety enforcement**
20 **by supervisory personnel prevents reliance upon the defense of**
21 **unpreventable employee misconduct to relieve respondent of liability.**
22 The defense of unpreventable employee misconduct and the burden of proof
23 to satisfy same is **substantial** under applicable law. Respondent
24 presented insufficient evidence to support the defense and meet its
25 burden of proof.

26 The board finds from the un rebutted testimony of CSHO Belcher and
27 the unrefuted interview statements taken at the job site in evidence,
28 Mr. Rod Peters was the designated foreman on the job site on the day of
the inspection. Under any plain meaning of the facts in evidence, Mr.

1 Peters occupied **supervisory personnel** status for the respondent.

2 Foreman Peters himself and with assistance of employee Rodriguez
3 both blatantly violated company safety policies.

4 In *Sec'y of Labor v. Westar Energy*, 20 BNA OSHC 1736 (OSHC Jan. 6,
5 2004) the Occupational Safety and Health Review Commission ruled that
6 "[w]here a supervising employee is involved, the proof of unpreventable
7 employee misconduct is more rigorous and the defense is more difficult
8 to establish since it is the supervisor's duty to protect the safety of
9 employees under his supervision." (Emphasis added)

10 The additional element of proof to support the defense of
11 unpreventable employee misconduct requires substantial evidence the
12 respondent has **taken steps to discover violations and effectively**
13 **enforced** the rules when violations are discovered. The weight of
14 evidence support findings that foreman Peters could easily observe the
15 violative conduct of employees under his supervision given the roof top
16 location of the work, and the employees were working in his plain view
17 based upon the photographs and testimony. The evidentiary findings
18 support an inference that the employer safety program was not
19 **meaningfully enforced**. Respondent had an ". . . **affirmative duty to**
20 **anticipate and protect against preventable hazardous conduct . . .**" by
21 its employees including foreman Peters. (emphasis added) (See *Leon*
22 *supra*, page 10).

23 The Nevada Occupational Safety and Health Review Board has adopted
24 the expanded employee misconduct defense to include **supervisory**
25 employees; however the facts and weight of evidence are insufficient to
26 meet the respondent's burden of proof to rebut the prima facie case of
27 violation. Mr. Peter's violative conduct, interview statements and
28 reported attitude standing alone belies reliance upon isolated,

1 unforeseeable employee misconduct. The respondent ". . . through the
2 exercise of reasonable due diligence should have known and been aware
3 of the violative conditions" at its jobsite. (*D.A. Collins Construction*
4 *Co.*, supra). This finding is exacerbated by the conduct of foreman,
5 supervisory employee Rod Peters, both with respect to oversight of his
6 men and working himself without safety equipment. The evidence requires
7 imputation of (constructive) knowledge to the employer respondent in
8 proof of the violation. (*Pabco Gypsum*, supra)

9 Mr. Peters blatant conduct on the second day by working without his
10 own required safety equipment and descending the roof in the basket of
11 a forklift driven by another respondent employee under his authority
12 strains the testimony of respondent witnesses that Mr. Peters had not
13 provided any indications of disregard for safety. The respondent
14 testimony that Mr. Peters is a longstanding employee with the company
15 and a very good worker while important to the respondent and the
16 industry, permits an inference that the company safety policy was not
17 meaningfully enforced on Mr. Peters. The subordinate employees were
18 disciplined and terminated yet Mr. Peters, who conducted himself in a
19 cavalier violative fashion remained as a foreman in the employ of
20 respondent.

21 It is the decision of the Nevada Occupational Safety and Health
22 Review Board that a violation of Nevada Revised Statutes did occur as
23 to Citation 1, Item 1, 29 CFR 1926.501(b)(1). The violation was
24 properly classified as serious and the penalty proposed of THREE
25 THOUSAND TWO HUNDRED SEVENTY TWO DOLLARS (\$3,272.00) is confirmed.

26 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
27 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
28 **DIVISION OF INDUSTRIAL RELATIONS,** to prepare and submit proposed

CALENDARED
DATE: _____

1 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**
2 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel
3 within twenty (20) days from date of decision. After five (5) days time
4 for filing any objection, the final Findings of Fact and Conclusions of
5 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
6 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and
7 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**
8 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the
9 **BOARD.**

10 DATED: This 13th day of August, 2013.

11 NEVADA OCCUPATIONAL SAFETY AND HEALTH
12 REVIEW BOARD

13 /s/
14 _____
15 JOE ADAMS, CHAIRMAN

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