

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD
3

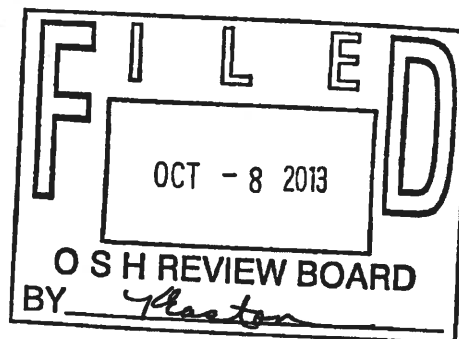
4 CHIEF ADMINISTRATIVE OFFICER
5 OF THE OCCUPATIONAL SAFETY AND
6 HEALTH ADMINISTRATION, DIVISION
7 OF INDUSTRIAL RELATIONS OF THE
8 DEPARTMENT OF BUSINESS AND
9 INDUSTRY,

Docket No. RNO 13-1653

Complainant,

vs.

10 DNA FRAMING, INC., dba DNA CARPENTRY,
11 Respondent.



12
13 DECISION

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 11th day of September
16 2013, in furtherance of notice duly provided according to law, **NANCY**
17 **WONG, ESQ.**, counsel appearing on behalf of the **Chief Administrative**
18 **Officer of the Occupational Safety and Administration, Division of**
19 **Industrial Relations (OSHA)**, and **CHARLES B. WOODMAN, ESQ.**, appearing on
20 behalf of respondent, **DNA FRAMING, INC.**; the **NEVADA OCCUPATIONAL SAFETY**
21 **AND HEALTH REVIEW BOARD** finds as follows:

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

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

27 Citation 1, Item 1 charges a violation of 29 CFR 1926.501(b) (13).
28 The complainant alleges two respondent employees installing roof

1 sheeting 6 feet or more above a lower level, were not protected from
2 falling by a guardrail, safety net, or personal fall arrest system. The
3 violation was classified as **Repeat/Serious**, and a proposed penalty
4 assessed at \$10,780.00.

5 Counsel for the complainant and respondent stipulated to the
6 admission of evidence identifying complainant Exhibits 1 through 4, and
7 respondent Exhibits A and B.

8 During opening statement, counsel for Respondent **admitted the facts**
9 **of violation** and asserted the sole issue before the board to be whether
10 evidence for the defense of unpreventable employee misconduct is
11 sufficient to relieve the employer of liability.

12 Counsel for the Chief Administrative Officer presented witness
13 testimony and documentary evidence with regard to the alleged
14 violations. Certified Safety and Health Officer (CSHO) Mr. Kurt Garrett
15 testified that on or about February 21, 2013 he conducted an inspection
16 of the respondent's construction work site in Las Vegas, Nevada. Mr.
17 Garrett referenced the Exhibit 1 inspection reports and identified
18 photographs at Exhibit 2. He observed two respondent employees
19 installing roof sheeting on a roof with an 8 in 12 pitch. Both employees
20 were wearing personal fall arrest harnesses but not attached by a safety
21 lanyard to any anchor points on the roof.

22 Counsel noted in continued direct examination of Mr. Garrett that
23 all the elements of violation had been subject of an admission through
24 stipulation by respondent, therefore continued questioning would be
25 focused on respondent's assertion of the defense of employee misconduct.

26 Mr. Garrett identified respondent employee Edacio Garcia Martinez
27 as a "lead man" with authority and responsibility to correct safety
28 violations at the worksite. He testified the respondent foreman, Mr.

1 Dan Charles, was the supervisory employee directly responsible for the
2 worksite. Mr. Charles had briefly left the job site prior to the CSHO
3 arrival. Lead man Martinez stated during his interview that he had
4 authority to recognize hazards and correct them. Mr. Martinez was
5 working directly below the roof structure where the two employees were
6 observed working without protection and photographed by CSHO Garrett.

7 Mr. Garrett testified he determined there to be one anchor point
8 located in the middle of the roof ridge running north and south, but
9 approximately 40 feet away from where he observed the two subject
10 employees working without tie off. He noted a second anchor point
11 located approximately 60 feet away on the roof ridge over the garage
12 area running east and west from where the employees were working. He
13 further testified that both subject employees interviewed informed him
14 they had received fall protection training by respondent but admitted
15 not being tied off when observed by Mr. Garrett.

16 CSHO Garrett testified his high severity rating as based upon the
17 height of the work from ground level in support of the **serious**
18 classification of the cited violation. He testified the citation was
19 appropriately subject of a **repeat** classification based upon a previous
20 similar confirmed violation issued on December 14, 2011. Mr. Garrett
21 referenced the Nevada Operations Manual as containing his enforcement
22 directions including how to classify violations and other enforcement
23 guidelines.

24 On cross-examination, CSHO Garrett testified the two subject
25 employees were not working near enough to any identified anchor points
26 for attachment. He testified that while the two employees informed him
27 during interviews they were attached earlier in the day, when asked
28 **where** they were working at the time of attachment, they could not be

1 specific. Mr. Garrett questioned the credibility of the subject
2 employees responses based upon his observations of the worksite.

3 Mr. Garrett identified Exhibit B as documentary evidence of
4 respondent fall protection training signed by the subject employees.
5 He testified the employees acknowledged their employer's fall protection
6 training but admitted they violated the company safety plan
7 requirements. On examination as to why the witness did not consider the
8 matter an isolated incident of **employee misconduct**, Mr. Garrett
9 responded that based upon his investigation the employee safety training
10 was not **meaningfully enforced**. He explained that he could not answer
11 as to the employees thought processes, and testified it clearly appeared
12 from the employee demeanor that they had violated and "got caught".

13 On the issue of employer knowledge, Mr. Garrett testified that
14 "lead man" carpenter Martinez signed statement confirmed his verbal
15 interview that he had supervisory authority to stop and correct hazards.
16 Mr. Garrett considered Mr. Martinez to be a supervisor and his
17 statements to constitute imputed **employer knowledge and foreseeability**
18 because the violations occurred in his presence or plain view.

19 At the conclusion of the complainant's case, the respondent
20 presented testimony and documentary evidence in defense of the citation.
21 Respondent witness, Mr. Daniel Charles, identified himself as the
22 foreman of the respondent employer, DNA Carpentry. He testified the
23 company has worked hard to comply with OSHA safety requirements to
24 assure that all employees were safety trained, given PPE, and subject
25 to compliance enforcement. He testified the company has a very good
26 safety program which assures a 10 hour OSHA card for employees and a 30
27 hour card for supervisors. He identified complainant's Exhibit 4, page
28 29, to be the company special fall protection plan implemented for the

1 subject and each roofing job. He testified all employees are required
2 to sign the job plan form to confirm understanding and compliance for
3 training and safety on their particular job tasks at each home subject
4 of their work. He referenced pages 29 through 35 of Exhibit 4 in
5 evidence.

6 Mr. Charles testified the company fall protection plan
7 documentation was very extensive with specific duties, designations of
8 which employees were trained to do each particular task, then signed off
9 by the employees responsible for performing same.

10 Mr. Charles testified that Mr. Ziegler, the company owner, directly
11 oversees all job operations, but out of the area on the day of the
12 inspection. His absence required the witness to briefly be away from
13 the site to run errands for company needs. He testified there were very
14 unusual circumstances on the day of the inspection.

15 Mr. Charles testified with regard to the company disciplinary
16 notices issued to the employees at Exhibit A, which he identified as the
17 documentation reflecting receipt of written warnings. He testified the
18 company safety plan embodies an enforcement policy for violative conduct
19 to result in a first offense written warning, second a monetary penalty
20 and third termination. He further testified that he had never
21 personally observed any DNA employee violate the company safety rules,
22 nor taken any action against other employees since his employment with
23 respondent.

24 Mr. Charles testified on other DNA safety policies including the
25 company safety committee comprising five employees and the rules for
26 crew members on each job to determine the location of fall arrest anchor
27 points.

28 On cross-examination Mr. Charles testified he was not the company

1 foreman in 2011 on the job where a previous similar violation occurred,
2 even though he started with the company in 2010. There are only two
3 foreman in the company but he was not the foreman on the job where the
4 violation subject of the repeat was issued.

5 Respondent presented witness testimony from Mr. David Ziegler who
6 identified himself as the company owner. He testified that in five
7 years of ownership and working as the job supervisor and safety
8 coordinator, he had only been away from work for three days; and one of
9 those was when the violation occurred. He testified the event was
10 unusual and could not be prevented. He implemented everything
11 reasonable to assure a safe worksite and takes extra steps with an
12 elaborate safety compliance policy and plan as demonstrated in
13 complainant's Exhibit 4, and respondent's Exhibits A and B. He
14 testified in addition to the written citations given to the two subject
15 employees, they were required to submit to safety retraining which
16 included consultation with SCATS and observing a video. He testified
17 there was nothing more he could do as an employer to assure employee
18 compliance; and made every reasonable effort to prevent violations. He
19 explained why the current violation must be fairly considered as
20 unpreventable employee misconduct.

21 Complainant counsel recalled CSHO Garrett as a rebuttal witness.
22 He testified in response to questions as to why he did not treat the
23 matter as a case of employee misconduct stating that it is usually based
24 upon an isolated incident. Here two employees in plain view, with a
25 lead man nearby, did not comply with the company safety policy and
26 training. He testified the employee misconduct defense was not
27 justified based upon facts he determined at the workplace including lack
28 of effective enforcement and steps to discover the violative conduct.

1 On cross-examination Mr. Garrett testified that lead man Martinez
2 was not a designated supervisor but told him he had authority to spot
3 and enforce safety violations. He further testified that when he
4 inquired of foreman Charles as to the statement by Mr. Martinez, he
5 (Charles) informed him that only the foreman and Mr. Ziegler had such
6 authority.

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

9 Complainant argued the burden of proof had been met to establish
10 the violation as cited and the repeat status confirmed by stipulation
11 and without rebuttal. She asserted the two employees photographed in
12 violation were not near enough to the identified anchor point to protect
13 themselves by tie off, and in plain view of Mr. Martinez or anyone else
14 on the job site. She argued effective enforcement of the work rules is
15 required, and that Exhibit 4 merely shows employees were trained. She
16 argued the requirements for an employee misconduct defense necessitate
17 the respondent proving all of the elements which include not only the
18 existence of work rules but adequate communication of the rules to
19 employees, steps actually taken to discover violations, and employer
20 effective enforcement of the rules when violations have been discovered.
21 She asserted there was no evidence of frequent, random, oversight or
22 inspections to discover the violations. She argued there was no evidence
23 of effective enforcement. The contrary can be demonstrated by no
24 showing of other than two previous safety violations subject of a
25 written reprimand, and none for monetary penalties. Five years of
26 company operations with only two documented disciplinary actions
27 provides the basis for an inference of lack of effective enforcement.
28 Counsel concluded by arguing the law only recognizes the defense of

1 **isolated unpreventable employee misconduct**, but here two employees in
2 plain view on a roof, in violation of the standard and in the presence
3 of an employee with apparent authority to correct, prohibits the
4 recognized defense of employee misconduct.

5 Respondent presented closing argument and reviewed the bases for
6 finding no violation due to unpreventable employee misconduct. Counsel
7 identified the proof elements for the recognized defense and asserted
8 the evidence in the record demonstrated the employer did everything he
9 reasonably could to prevent employee violations of the fall arrest
10 standards. It was a very unique day when Mr. Ziegler was away from the
11 work for the first time in five years, and foreman Charles briefly left
12 the worksite. The employees were all well trained under an elaborate
13 safety plan. The respondent is doing more than anyone around the Las
14 Vegas area by implementing and enforcing a very elaborate safety plan.
15 The plan requires not only training, but special forms to be
16 individually signed by employees designating their duties and training
17 for each house subject of the roofing work. He argued that to hold this
18 respondent to a higher standard is not reasonable when he is doing all
19 that can realistically be done to protect employees while trying to stay
20 in business in a highly competitive market. He concluded by arguing the
21 board should not hold the respondent who provided extensive evidence of
22 safety compliance and in fact met its burden of proof under the employee
23 misconduct defense to an unreasonable degree of responsibility.

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

28 In all proceedings commenced by the filing of a
notice of contest, the burden of proof rests with

1 the Administrator. (See NAC 618.788(1)).

2 All facts forming the basis of a complaint must be
3 proved by a preponderance of the evidence. See
4 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
5 ¶16,958 (1973).

6 A "serious" violation is established in accordance with NRS
7 618.625(2) which provides in pertinent part:

8 . . . a serious violation exists in a place of
9 employment if there is a substantial probability
10 that death or serious physical harm could result
11 from a condition which exists or from one or more
12 practices, means, methods, operations or processes
13 which have been adopted or are in use at that place
14 of employment unless the employer did not and could
15 not, with the exercise of reasonable diligence,
16 know the presence of the violation.

17 To establish a prima facie case, the Secretary
18 (Chief Administrative Officer) must prove the
19 existence of a violation, the exposure of
20 employees, the reasonableness of the abatement
21 period, and the appropriateness of the penalty.
22 *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD
23 ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1
24 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

25 To prove a violation of a standard, the Secretary
26 must establish (1) the **applicability** of the
27 standard, (2) the existence of **noncomplying**
28 **conditions**, (3) **employee exposure** or access, and
(4) that the employer knew or with the exercise of
reasonable diligence could have known of the
violative condition. See *Belger Cartage Service,*
Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
(No. 76-1408, 1979); *American Wrecking Corp. v.*
Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

29 To establish a repeat violation the complainant must provide
30 evidence of a substantially similar violation. *Modem Cont'l Constr.*
31 *Co.*, 19 OSH Cases 2033, 2038 (Rev. Comm'n 2002). *Hackensack Steel*
32 *Corp.*, 20 OSH Cases 1387, 1392-93 (Rev. Comm'n 2003); *Secretary of Labor*
33 *v. Active Oil Serv.*, 21 OSH Cases 1185, 1189 (Rev. Comm'n 2005)

1 A respondent may rebut allegations by showing:

- 2 1. The standard was inapplicable to the situation
3 at issue;
- 4 2. The situation was in compliance; or lack of
5 access to a hazard. See *Anning-Johnson Co.*,
6 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
- 7 3. Proof by a preponderance of substantial
8 evidence of a recognized defense.

9 The board finds the complainant evidence met the burden of proof
10 of to establish the facts of violation at Citation 1, Item 1, however
11 the respondent met its burden of proof to rebut and avoid a finding of
12 violation through the recognized defense of **unpreventable employee**
13 **misconduct**. The burden of proof rests with OSHA under Nevada law (NAC
14 618.788); but after establishing same, the burden shifts to the
15 respondent to prove any recognized defenses. See *Jensen Construction*
16 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10
17 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

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

- 20 (1) The employer must establish **work rules**
21 designated to prevent the violation
- 22 (2) The employer must **adequately communicate** these
23 rules to its employees
- 24 (3) The employer must take **steps to discover violations**
- 25 (4) The employer must **effectively enforce the rules**
26 when violations have been discovered.

27 In the subject case, the evidence was undisputed that the employer
28 had **established work rules** designed to prevent the violation. The
testimony of respondent witnesses, the documentary evidence, and cross-
examination testimony of CSHO Garrett supported the first element of the
defense. NVOSHA did not establish preponderant evidence that respondent

1 failed to provide the type or amount of sufficient training that a
2 reasonable employer in similar circumstances would have provided to its
3 employees. See, *El Paso Crane and Rigging CO.*, 16 BNA OSHC 1419, 1424
4 (No. 90-1106, 1993). *Pacific Coast Steel v. State of Nevada*,
5 *Occupational Safety and Health Administration, Division of Industrial*
6 *Relations, Department of Business and Industry, Case A-11-634068-J*,
7 *Clark County District Court, unpublished.*

8 The employer adequately communicated the rules through training of
9 its employees as demonstrated by the documentary evidence and unrebutted
10 sworn testimony of Messrs. Charles and Ziegler. There was no evidence
11 offered or submitted by complainant that the employees were untrained,
12 uninformed in safety instructions, or the workplace safety requirements
13 under the company plan. To the contrary, the sworn credible testimony
14 of respondent witnesses was unrebutted and provided a preponderance of
15 evidence for the element of adequate communication. Further the
16 elaborate respondent safety policy, which included a written job site
17 specific work plan for each unit in the subdivision signed by the
18 employees requiring each individual employee sign off on specific
19 designations for training and work tasks was substantial evidence of
20 adequate communication.

21 The evidence established the respondent employer took reasonable
22 steps to discover violations. Mr. Charles and Mr. Ziegler testified on
23 their oversight and inspection program to determine whether employees
24 are compliant with the company safety plan. The unimpeached testimony
25 of both individuals, and even the statement of Mr. Martinez in evidence,
26 all supported a reasonable program for efforts to discovery violations.
27 The subject job consisted of comparatively few employees and all had
28 been trained in safety by respondent. Although not working directly

1 with a foreman at the time of inspection, foreman Charles was
2 specifically assigned to oversee the work efforts with supervisory
3 authority to discipline and take formal action against employees who
4 violated safety requirements. The un rebutted testimony was the foreman
5 was called away for a brief time by necessity when the infractions
6 occurred. The evidence demonstrated that while "lead" man Martinez felt
7 he had responsibility to watch over safety and inform fellow employees,
8 he was without authority to discipline either by his title or work
9 designation.

10 Arguments by complainant counsel on the limited history of
11 disciplinary action as indicating a lack of evidence the employer took
12 steps of discovery or enforcement are speculative and not subject of
13 legal inference to rebut the substantial evidence in support of the
14 employee misconduct defense. While it may be arguable that more could
15 have been done with greater oversight, more supervisory employees, and
16 heavier discipline, the evidence in the record is substantial and
17 preponderant therefore sufficient under the recognized case law to
18 satisfy the elements for the defense of unpreventable employee
19 misconduct.

20 The employer **effectively enforced work rules when violations were**
21 **discovered.** The documents in evidence established the existent company
22 safety plan, the disciplinary action provisions, and the "three strikes
23 your out" policy. It was uncontroverted. Messrs. Charles and Ziegler
24 testified they enforced the disciplinary rules in accordance with the
25 plan. The subject employees were first time offenders and disciplined
26 under the company plan. With a comparatively small worksite, spot
27 checking by the supervisory employees on a regular but random basis,
28 issuing verbal, then written warnings and termination, is sufficient

1 substantial evidence of **effectively enforced work rules.**

2 No employer or even a foreman can absolutely assure or police every
3 moment of an employee's work day to guarantee compliance nor is there
4 any OSHA requirement for same. The case law precedent measures the
5 elements of violation against **reasonable prevention and foreseeability.**

6 Based upon facts, evidence and testimony, it is the decision of the
7 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that no violation of
8 Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR
9 1926.501(b)(13) and the proposed penalties are denied.

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

20 DATED: This 8th day of October 2013.

21 NEVADA OCCUPATIONAL SAFETY AND HEALTH
22 REVIEW BOARD

23 /s/

24 JOE ADAMS, CHAIRMAN

25
26
27
28