NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

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

Complainant,

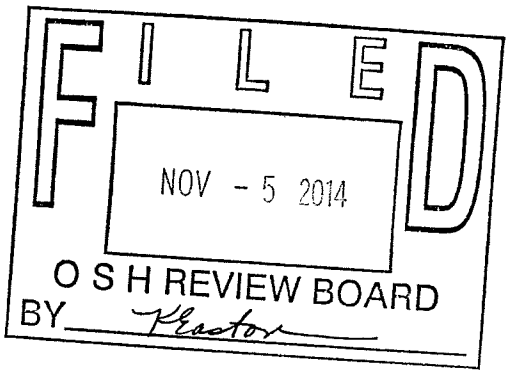
vs.

DNA FRAMING, INC., dba DNA CARPENTRY,

Respondent.

_____/

Docket No. RNO 14-1713



D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of July 2014, and continued and concluded on the 8th day of October 2014, in furtherance of notice duly provided according to law, SALLI ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations** (OSHA), and PETER SMITH, ESQ., appearing on behalf of respondent, **DNA FRAMING, INC.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

Citation 1, Item 1 charges a violation of 29 CFR 1926.501(b)(13), which provides in pertinent part:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

Complainant alleged two respondent employees were engaged in residential construction work on a roof at heights of 10 feet six inches to 30 feet six inches and not protected by guard rails, safety net systems, or personal fall arrest systems. The employees were wearing harnesses without lanyards attached to the "D" rings. They were exposed to serious injuries in the event of falls from the roof to the levels below which could result in broken bones, severe trauma or death.

A citation was previously issued for violation of 1926.501(b)(13) charging employees were not protected from fall hazards while performing residential construction. The previous citation in inspection 316067990, was affirmed as a final order on 1/09/2012.

The subject violation is classified as "Repeat/Serious". The proposed penalty for the alleged violation is in the amount of $10,780.00.

Counsel for the complainant and respondent stipulated to the admission of evidence identifying complainant Exhibits 1 through 3, and respondent Exhibits A, B and C.

During opening statement, counsel for complainant asserted the violation will be proven by a preponderance of evidence based upon the

CSHO testimony, documentary exhibits, and photographs obtained during the inspection of the respondent job site. Counsel referenced an expected defense of "employee misconduct," but asserted there is no evidence of "meaningful enforcement" of the company work rules nor effective efforts to "discover violations" of the fall hazard standard, which are required proof elements under OSHA law.

Respondent at opening statement asserted the inspection was conducted improperly without any basis recognized under applicable law, and further that should violative conduct be found, the defense of employee misconduct for an isolated incident will be demonstrated by the evidence and testimony.

Counsel for the Chief Administrative Officer presented witness testimony and documentary evidence with regard to the alleged violation. Certified Safety and Health Officer (CSHO) Mr. Chris Carling testified that he and CSHO Luke Hendrickson were driving from Reno to Carson City, Nevada to investigate an assigned matter and, from the roadway, observed two employees working at the roof of a three-story building without any visible fall protection. The CSHOs determined the individuals could be in "imminent danger" working unprotected at a three story height and changed their course of direction to investigate the matter. Arriving closer to the construction site, they observed three employees working on the roof of building number 13, at the Arrowcreek Village Apartments. The employees appeared to be wearing harnesses but the distance was too great to determine whether lanyards were in use. No guard rails or alternate means of fall protection were visible. Upon entering the site and getting closer, it became clear that two employees were wearing harnesses but the lanyards were not attached to the "D rings". No other employee was present on the same plane acting as a "monitor". No guard

rail or safety net system was in use. The employees were observed working on trusses at the west side and exposed to fall hazard of 10 feet 6 inches to the third story floor below; and on sheathing at the 4 in 12 pitch roof with a fall hazard distance of 30 feet, 6 inches from the eave to the ground below.

The acting superintendent of the general contractor Tanamera, Mr. Ron Miarski, granted access to the worksite to conduct the inspection. An opening conference was held with Mr. David Ziegler, President of the subcontractor respondent DNA Carpentry. Mr. Carling explained the nature, purpose, scope and authority to conduct the inspection and a walkaround inspection was conducted with Mr. David Ziegler.

Mr. Miarski directed the compliance officers to DNA Carpentry foreman Mr. Ooli Haskas to request the two employees observed on the roof either tie off or come down. Mr. Haskas complied with the request and both employees came down from the roof.

The respondent construction work at the jobsite consisted of framing three story apartment buildings. At the time of the inspection, the employer had a total of 25 employees performing framing work on a number of the three story apartment building units in various stages of construction from foundation to roof sheathing.

CSHO Carling continued direct testimony referencing his inspection safety narrative stipulated in evidence at Exhibit 1, pages 13-15.

DNA Carpentry Foreman Haskas was working at the ground level where building material was stored and lumber cut. He reported his last inspection in the area where the two subject employees were working was between 1:30 and 2:00 pm. He informed the CSHOs that all employees were "tied off". He also reported that from where he was working at the ground level he was able to observe the employees to confirm they were

"tied off".

Photographs in evidence depicted Employees initially identified as #1 and #2 working on the roof wearing harnesses without lanyards attached. Mr. Carling testified the photos at Exhibit 1, pages 49 and 49a taken from where Mr. Haskas was working showed, from the angle, the top deck of the roof could not be seen.

Mr. Carling continued his testimony referencing the witness statements at Exhibit 1, pages 19 and 20 obtained from the Employees #1 and #2. Employee #1 stated he "untied" to move and forgot to reconnect to another anchor . . . there were anchors at two locations. Employee #2 stated he had gone down to use the toilet facility after lunch and forgot to reconnect. Both employees claimed to have fall hazard training from previous employers and DNA Carpentry. Once DNA President David Ziegler arrived, foreman Haskas left to write Safety Violation Notices for the two employees observed by the CSHOs without required fall protection. The employees described the training provided by previous employers and from foreman Haskas and Mr. Ziegler. They were able to answer the inspectors questions on fall protection. A certificate of training provided by DNA Carpentry was dated October 25th, 2013, the day after the inspection.

Mr. Carling testified the violative condition observed on 10/24/2013 was "foreseeable and preventable". It was not "isolated" because two employees were not using their personal fall arrest systems for an extended period of time.

Mr. Carling testified Mr. Haskas reported he was a "working foreman" and cutting lumber at the time of the violative occurrences. He identified the statement taken at page 18 of Exhibit 1, reflecting Mr. Haskas inspected the area in the morning and noted all the employees

were tied off and particularly observed the two employees subject of the violation to be in compliance. He testified that although Mr. Haskas told him he could observe the two employees, both CSHO Carling and Hendrickson noted it was not possible to see the individuals working on the roof because of the height of the building and the angle proximity of where Mr. Haskas reported he had observed them in compliance.

On 10/4/2011, a substantially similar violative condition was cited on inspection #316067990. Mr. Carling testified the previous violation to be a final order and recommended the subject violation be cited as "repeat/serious". He identified the previous confirmed violation at Exhibit 1, pages 52-75.

On cross-examination, respondent counsel challenged CSHO Carling's initial basis for the inspection. Counsel inquired how it was possible to be driving a vehicle 65 miles per hour heading South as a driver and observe at a distance of perhaps a quarter mile that two employees on a roof were not tied off. Mr. Carlin responded he could see enough to believe there were employees exposed to "imminent danger" so proceeded to the work site for a closer look. Counsel questioned the lack of apparent lawful basis for driving over to inspect from that far away, and inquired when an inspection may begin. Mr. Carling responded that when he arrived at the site, presented his credentials and explained the rights, th employer could have disallowed entry.

Counsel referenced Exhibit A, page 6, 2(a) describing the lawful enforcement process to enter a worksite after presentation of credentials; the witness responded it was the correct procedure. Counsel inquired as to Exhibit A, page 8, and inquired whether the procedures provided him a right to move closer to the work area to inspect without ever having been assigned the inspection by a

supervisor. The witness responded he had an "obligation to inspect" if he observed an employee working in unsafe conditions.

Counsel continued cross-examination and referenced respondent's Exhibit C inquiring whether the fall protection plan was found adequate. Mr. Carling responded it was an adequate plan. On further questioning he testified that had the employees been in compliance with the company plan, the OSHA standard requirements would have been satisfied. Counsel further inquired whether the basis of the citation was based upon failure of the company to implement the plan, to which the witness responded affirmatively.

Continued cross-examination of CSHO Carling focused on the witness statements at Exhibit 1, pages 19 and 20 and confirmed the actual identity and employer of Employees #1 and #2, based upon the photographs and personal observations.

At the conclusion of the complainant's case the respondent presented testimony and documentary evidence in defense of the citation. Respondent witness Mr. David Ziegler identified himself as the company president and owner. He testified with regard to the development of the company safety plan and the employee training policies as referenced at Exhibit C. He described the progressive disciplinary program established by the respondent. He further testified the employees were engaged in "piece work" which often motivates them to work faster and go onto the next job to make more money. He further testified the company is constantly required to take extra efforts to assure that safety in accordance with the OSHA standards is a priority over speed and the desire of employees to complete the subject job tasks. He testified Exhibit C, page 13 to be a copy of the safety violation notice for failure to tie off. Exhibit B was identified and explained as the

safety violation notices given to other employees prior to the subject citation to show evidence of actual enforcement of the company safety program.

Mr. Ziegler testified he provides "countless hours of training to be sure the foremen are keeping the employees safe." In response to questioning he explained that with so many employees on the site working at a rapid pace under the piece work system, it is difficult to find every violation when it actually occurs. He described it as a "cat and mouse" issue with the employee when they seem to get careless or simply develop bad habits toward safety.

On cross-examination Mr. Ziegler testified the job superintendent manages manpower and runs the job operations but he is not a "working supervisor" so able to focus on employee safety compliance. He further denied foreman Haskas was "cutting lumber" at the time of the inspection, and testified ". . . if that occurred it was not to my knowledge." Foreman Haskas was required to oversee 35-40 employees on the site and counsel questioned whether that was simply unmanageable. Mr. Ziegler testified it was reasonable management and ". . .we can't hire 40 people to watch 40 people . . . that's simply not feasible . . .". He testified that in 2012 he had three or four supervisors and in 2013 increased the number to five or six.

Counsel challenged the witness with regard to the "meaningful" aspects of the step disciplinary program as being uneven and ineffective to establish meaningful enforcement. Mr. Ziegler denied the program was other than reasonable and equal to that utilized by other companies.

Respondent presented testimony from general foreman Miguel Castro. He explained how employees are trained at the company, the bilingual policy, the safety compliance standards in place, and his personal

involvement with the disciplinary program for employee violative conduct. He described "tailgate" meetings routinely conducted and testified he was familiar with the two violating employees, Sergio De Dios and Isiorio Trujillo. He testified they were specially trained in fall protection at the time of hire. He identified Exhibit C, page 10 and testified the two employees were also trained at the tailgate meeting prior to the inspection.

Mr. Oolie Haskas identified himself as the DNA foreman on the job site at the time of the inspection. He testified the respondent has the best fall protection safety plan ever seen compared to companies he worked for over 20 plus years in the business. He explained the Exhibit C safety plan to be "site specific" for each building under construction and subject of employee work. The site specific plan was signed by both the violating employees Sergio De Dios and Isiorio Trujillo. He further testified the subject employees were capable in English, and described the company processes for assuring meaningful understanding through translation to Spanish from English. He testified the two CSHOs identified themselves at the end of the work day between 4:00 and 4:30 pm. When he and the CSHOs looked toward the two subject employees, all noticed they were not tied off. Mr. Haskas testified he had personally worked with the two violating employees for over 10 years, so very surprised they were not utilizing appropriate fall protection as they are experienced and reliable individuals.

On cross-examination Mr. Haskas testified he observed both employees tied off after lunch, but admitted when the CSHOs came and he looked together with them, "Sergio and Isiorio were not tied off".

At the completion of evidence and testimony, the complainant and respondent presented closing argument.

Complainant argued the elements of violation were established by preponderant evidence and the burden of proof satisfied as required under OSHA law. It was undisputed the two employees were not tied off at the time observed by both CSHO's and foreman Haskas. The employer "knew or should have known" of violative conditions. The respondent witnesses both testified they understood employees will routinely disobey the rules. There was no dispute the violations were serious based upon the height of work. The evidence was unrebutted that the previous violation was appropriately subject of a final order for "repeat" classification.

Counsel further argued the respondent did not prove the defense of employee misconduct. She asserted it was not reasonable for one foreman to be supervising 30 to 40 employees so there was no "meaningful enforcement" of the work rules as required for the defense. She further asserted that while it's true the employer is not required to police "every minute of work", that does not mean the employer is not required to reasonably enforce safety standards for violations that are "foreseeable". It was well-known to them that employees will forget, avoid or cheat on safety to perform their "piece work" faster.

Counsel argued there was no legal basis or support for the inspection to be anything other than proper. CSHO Carling testified he believed employees were exposed to imminent danger so he drove closer to the site and observed the employees were not tied off. Credentials were then presented and the employer admitted the CSHOs to the worksite. There was no trespass or any evidence the inspection was improper or vindictive.

Counsel identified the legal requirements to prove the defense of employee misconduct. She argued that while the respondent did have an

adequate safety plan, it was not effectively communicated. The evidence included admissions that different persons initially trained employees due to a language barrier, the weekly safety meetings lasted only 10-15 minutes, so it is not reasonable to assume all the matters listed for the training were "adequately communicated or enforced". The procedure for enforcing discipline by "write ups or verbal" was confusing as demonstrated by the testimony of the witnesses. Counsel argued there was no evidence of adequate enforcement through any progressive step plan, which is a required element to support and prove the employee misconduct defense. Counsel further asserted reasonable steps were not taken by DNA to enforce safety policies and their program simply "not meaningful". She further argued the evidence shows there is really no "progressive disciplinary plan" because some violations are initially verbal but then reduced to writing, some employees not fined at all, and simply no consistency to the plan. Counsel concluded there was no adequate enforcement of work rules demonstrated by the employers previous violation of the same standard. It's time to "send a message" to the employer they must take other action to assure safety of employees at their work site.

Respondent presented closing argument and asserted there should be no finding a violation based upon two principles. The first is due to an improper inspection initiated without any lawful basis. The second is because the defense of an isolated incident of employee misconduct was proven by the preponderant evidence.

Counsel asserted the evidence established the company proved all required elements to establish the defense of employee misconduct. A company with 100 employees having only a few citations should be evidence alone that DNA is not a bad company nor a non-safety conscious

organization. OSHA says they need more supervisors but it's simply neither reasonable nor feasible to hire multiple individuals to watch experienced employees who have been trained to perform the work task. "There is a limit on what any employer can do . . .". Employees know the rules but two good employees chose to disobey. If the Board finds the company policy deficient then it's not feasible to ever comply. No OSHA law requires "strict liability" of any employer on a worksite, particularly when all safety requirements are in place and the company demonstrates it has reasonably enforced work rules. This was an isolated incident of employee misconduct and should not be confirmed as a violation.

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

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).

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

> . . . a serious violation exists in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations or processes which have been adopted or are in use at that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation.
>
> To establish a prima facie case, the Secretary (Chief Administrative Officer) must prove the existence of a violation, the exposure of

employees, the reasonableness of the abatement period, and the appropriateness of the penalty. *Bechtel Corporation*, 2 OSHC 1336, 1974-1975 OSHD ¶18,906 (1974); *Crescent Wharf & Warehouse Co.*, 1 OSHC 1219, 1971-1973 OSHD ¶15,047. (1972).

To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying 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).

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;

2. The situation was in compliance; or lack of access to a hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

3. Proof of a recognized defense by a preponderance of substantial evidence.

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

The Board finds the complainant evidence met the burden of proof of to establish the facts of violation at Citation 1, Item 1 however the respondent met its burden of proof to rebut and avoid a finding of violation through the recognized defense of an isolated incident of **unpreventable employee misconduct.** The burden of proof rests with OSHA

under Nevada law (NAC 618.788); but after establishing same, the burden shifts to the respondent to prove any recognized defenses. See *Jensen Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10 OHSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

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

(1) The employer must establish **work rules** designated to prevent the violation

(2) The employer must **adequately communicate** these rules to its employees

(3) The employer must take **steps to discover violations**

(4) The employer must **effectively enforce the rules** when violations have been discovered.

In the subject case, the evidence was undisputed the employer had **established work rules** designed to prevent fall hazard violations. The testimony of respondent witnesses, the documentary evidence, and cross-examination testimony of CSHO Carling supported the first element of the defense. There was no preponderant evidence that the respondent failed to provide the type or amount of sufficient training that a reasonable employer in similar circumstances would have provided to its employees. *See, El Paso Crane and Rigging CO.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993). *Pacific Coast Steel v. State of Nevada, Occupational Safety and Health Administration, Division of Industrial Relations, Department of Business and Industry,* Case A-11-634068-J, Clark County District Court, unpublished.

The employer **adequately communicated** the rules through training of its employees as demonstrated by the documentary evidence and unrebutted sworn testimony of Messrs. Ziegler, Castro and Haskas. There was no preponderant evidence that the employees were untrained, uninformed in

safety instructions, or lacked understanding of the workplace safety requirements under the company plan. To the contrary, the sworn credible testimony of respondent witnesses was unrebutted and provided a preponderance of evidence for the element of adequate communication. The respondent safety policy included a written "job site specific work plan" for each building unit in the subdivision. Employees were required to sign a verification for the specific designations of training and work tasks. This practice was substantial evidence of adequate communication.

The evidence also established the respondent employer took reasonable **steps to discover violations.** Mr. Ziegler and Mr. Haskas testified on their oversight and inspection program to determine employee compliance with the company safety plan. The unimpeached testimony of both individuals, and the statements of the violating employees in evidence, supported the existence of reasonable program for discovery of violations. The exhibits stipulated in evidence by respondent, Exhibits B and C, corroborated the testimonial evidence of a meaningfully communicated plan and adequate enforcement.

The facts in evidence, the documentary exhibits, and the testimony established the defense of employee misconduct as recognized under occupational safety and health law.

The facts demonstrated a very large project under construction and over 100 employees of the respondent on site at the time of the inspection. Two employees, Messrs. De Dios and Trujillo, were observed working on a three story building toward the rear of the project and very difficult to see unless a supervisor particularly inspected the rear of the building at the time of the violative conduct. Accordingly, the violations were not in the **"plain view"** of any foreman supervising

the substantial number of employees on the site. It is difficult to impute employer knowledge of an isolated incident which, late in the day, between 4:00 and 4:30 confirmed two employees were not appropriately tied off in accordance with the cited standard. No other employees were observed by the CSHOs on the site in violation of the fall protection standards. The violating employees were wearing their harnesses although not connected to lanyards. A foreman would have had to be close enough and located at a particular angle to notice at the three-story height there were no lanyards attached to the harnesses. An initial observation could easily warrant a safety enforcement officer, or foreman, inferring that with the harnesses being in place, lanyards would be appropriately connected.

There was no evidence of widespread violative conduct on the site. Given the number of employees, the late hour of inspection at end of the working day, the sworn testimony of the foreman that he observed the employees tied-off when he made his inspection tour only two to three hours before the inspection, and evidence of an acceptable safety plan supported the defense of an isolated incident of employee misconduct to satisfy the requirements of recognized occupational safety and health law. *Jensen Construction, supra*, page 10, *Marson Corp., supra,* page 10.

> *E.g., Brock v. L.E. Myers Co.*, 818 F.2d 1270, 13 OSH Cases 1289 (6th Cir.), *cert. denied,* 484 U.S. 989 (1987); *Texland Drilling Corp.,* 9 OSH Cases 1023 (Rev. Comm'n 1980). *E.g. Capform Inc.,* 16 OSH Cases 2040, 2043 (Rev. Comm'n 1994).

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

> *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the

fountainhead case repeatedly cited to relieve employers responsibility for the allegedly disobedient and negligent act of employees which violate specific standards promulgated under the Act, and sets forth the principal which has been confirmed in an extensive line of OSHC cases and reconfirmed in *Secretary of Labor v. A. Hansen Masonry*, 19 O.S.H.C. 1041, 1042 (2000).

An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of [the specific duty clause] by the employer. *Id.*, 1 O.S.H.C. at 1046. (emphasis added)

It is further noted that "**employers are not liable under the Act for an individual single act of an employee which an employer cannot prevent.**" *Id.*, 3 O.S.H.C. at 1982. The OSHRC has repeatedly held that "employers, however, have an affirmative duty to protect against preventable hazards and preventable hazardous conduct by employees. *Id.* See also, *Brock v. L.E. Meyers CO.*, 818 F.2d 1270 (6th Cir.), *cert. denied* 484 U.S. 989 (1987). (emphasis added)

The controlling cases make clear the existence of an employer's defense for the unforeseeable disobedience of an employee who violates the specific duty clause. However, the disobedience defense will fail if the employer does not effectively communicate and conscientiously enforce the safety program at all times. Even when a safety program is thorough and properly conceived, lax administration renders it ineffective. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110-111 (1st Cir. 1997). Although the mere occurrence of a safety violation does not establish ineffective enforcement, *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000) the employer must show that it took adequate steps to discover violations of its work rules and an effective system to detect unsafe conditions control. *Secretary of Labor v. Fishel Co.*, 18 O.S.H.C. 1530, 1531 (1998). Failure to follow through and to require employees to abide by safety standards should be evidence that disciplinary action against disobedient employees progressed to levels of punishment designed to provide deterrence. *Id.* See also, *Secretary of Labor v.*

A&W Construction Services, Inc., 19 O.S.H.C. 1659, 1664 (2001); *Secretary of Labor v. Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314 (2000). A disciplinary program consisting solely of verbal warnings is insufficient. *Secretary of Labor v. Reynolds Inc.*, 19 O.S.H.C. 1653, 1657 (2001); *Secretary of Labor v. Dayton Hudson Corp.*, 19 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary action that occurs long after the violation was committed may be found ineffective.

There was no evidence to support the defense of unreasonable inspection. Most notably, the employer had the opportunity and right to deny the CSHOs entry onto the site after credentials were presented. The testimony of both Messrs. Carling and Ziegler reflected permitted entry was allowed.

> Section 8(a) of the Act authorizes OSHA 'to inspect and investigate during regular working hours and at other *reasonable times*, and *within reasonable limits and in a reasonable manner*, any such place of employment and all pertinent conditions . . ..' 29 U.S.C. §651(a)(2)(emphasis added)
>
> **To establish the defense of an unreasonable inspection, the employer must introduce sufficient evidence of unreasonable conduct by the OSHA investigator such that the employer's preparation or defense is prejudiced.** The **remedy for failure** to comply with Section 8(a) **is not dismissal** of the citations, but suppression of evidence gained from the inspection. (emphasis added)
>
> Unreasonable inspection challenges can assert a variety of actions by the investigator including alleged violations of OSHA's Field Operations Manual (FOM). The Review Commission has held, however, that the FOM is only a guide to OSHA personnel to promote efficiency and uniformity, is not binding on OSHA, and does not accord the employer any procedural or substantive rights or defenses. *Hamilton Fixture*, 16 OSH Cases 1073, 1077 (Rev. Comm'n 1993), *aff'd, Hamilton Fixture v. Secretary of Labor*, 16 OSH Cases 1889 (6th Cir. 1994). *Environmental Utils. Corp.*, 5 OSH Cases 1195, 1196-97 (Rev. Comm'n 1997 (footnote omitted). *See, e.g., L.R. Willson and Sons, Inc.*, 17 OSH Cases 2059, 2060-63 (Rev. Comm'n 1997) (videotaping worksite without notice to employer permissible); *GEM Indus. Inc.*, 17 OSH Cases 1184 (Rev. Comm'n 1995) (gathering evidence prior to opening

conference permissible); *Suttles Truck Leasing, Inc.*, 20 OSH Cases 1953 (Rev. Comm'n 2004) (inspector's prior misconduct resulting in discipline did not warrant rejection of testimony). *Hamilton Fixture*, 16 OSH Cases at 1079, *see also Consolidated Freightways Corp.*, 16 OSH Cases 1317, 1323 n.10 (Rev. Comm'n 1991).

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

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

DATED: This 5th day of November 2014.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: /s/
JOE ADAMS, CHAIRMAN