

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,

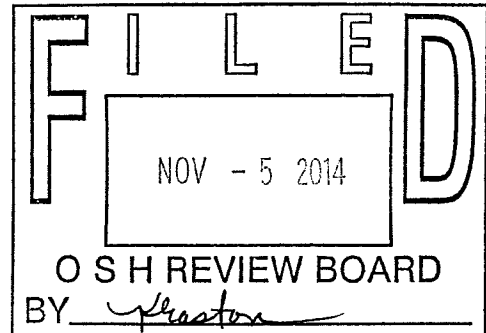
Docket No. RNO 14-1743

Complainant,

vs.

10 DNA FRAMING, INC., dba DNA CARPENTRY,

11 Respondent.
12 _____/



13 D E C I S I O N

14 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
15 **HEALTH REVIEW BOARD** at a hearing commenced on the 8th day of October
16 2014, in furtherance of notice duly provided according to law, SALLI
17 ORTIZ, ESQ., counsel appearing on behalf of the **Chief Administrative**
18 **Officer of the Occupational Safety and Administration, Division of**
19 **Industrial Relations** (OSHA), and PETER SMITH, ESQ., appearing on behalf
20 of respondent, **DNA FRAMING, INC.**; the **NEVADA OCCUPATIONAL SAFETY AND**
21 **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 which provides in pertinent part:

1 Each employee engaged in residential construction
2 activities 6 feet (1.8 m) or more above lower
3 levels shall be protected by guardrail systems,
4 safety net system, or personal fall arrest system
5 unless another provision in paragraph (b) of this
6 section provides for an alternative fall protection
7 measure. Exception: When the employer can
8 demonstrate that it is infeasible or creates a
9 greater hazard to use these systems, the employer
10 shall develop and implement a fall protection plan
11 which meets the requirements of paragraph (k) of
12 1926.502.

8 Complainant charged three respondent employees were engaged in
9 residential construction activities 10 feet or more above a lower level
10 and not protected by a guardrail system, safety net system, or personal
11 fall arrest system to prevent falls to a lower level.

12 The violation was classified as "Repeat/Serious". A citation was
13 previously issued for a violation of 1926.501(b)(13) for employees not
14 being protected from falling while performing residential construction.
15 The citation previously issued was contained in inspection 316067990,
16 Citation 1, Item 1 and was affirmed as a final order on 12/14/2011. The
17 proposed penalty for the current alleged violation is in the amount of
18 \$15,400.00.

19 Counsel for the complainant and respondent stipulated to the
20 admission of evidence identifying complainant Exhibits 1 and 2, and
21 respondent Exhibit A.

22 During opening statements, counsel for complainant asserted the
23 elements of violation will be proven in accordance with the established
24 burden of proof. Respondent counsel asserted the employer implemented
25 all requirements under the OSHA regulations to reasonably comply with
26 the cited standard and the evidence will establish a rebuttal of any
27 findings of violation under the recognized defense of unpreventable
28 employee misconduct.

1 Counsel for the Chief Administrative Officer presented witness
2 testimony and documentary evidence with regard to the alleged violation.
3 Certified Safety and Health Officer (CSHO) Mr. Kurt Garrett testified
4 that on or about April 23, 2014 he conducted an inspection of the
5 respondent's worksite near Steamboat Parkway in Reno, Nevada. He
6 referenced his inspection report and identified photographs depicting
7 the cited violative conduct at Exhibit 1, pages 40-42. He referenced
8 his narrative report at Exhibit 1, also in evidence by stipulation.

9 The general contractor superintendent for Toll Brothers admitted
10 CSHO Garret to the project property and after an opening conference
11 granted entry to the construction area job site. The project involved
12 the development of approximately 50 homes and a substantial number of
13 employees working on many of the structures. He observed and noted
14 employees working on the roof of two different houses under construction
15 at the southwest corner of the project. Two employees were observed
16 on the roof at the west side of a structure installing fascia board
17 without fall protection 10 feet above a lower level at Lot #79. A third
18 employee was observed working 10 feet above a lower level without fall
19 protection while cutting "tails" off of a ridge truss at the southeast
20 corner of Lot #44. The walkaround inspection in the company of Mr.
21 David Ziegler, owner of DNA Carpentry, and Mr. Miguel Castro, the
22 company superintendent, revealed a third employee working at the edge
23 of a "top plate" and not tied off to his lanyard. All three employees
24 (#1, #2 and #3) were observed with their personal fall arrest harnesses
25 but none of the three employees had a safety lanyard attached to the
26 harnesses. Mr. Garrett found only one anchor point instead of two
27 installed on the west side of the roof at Lot 79 where the two employees
28 were observed working without fall protection.

1 Mr. Garrett testified he did not believe the conduct qualified as
2 an "isolated incident" because of the separate violations on two
3 different roof working areas including three employees and a
4 superintendent was on the site at the time of inspection.

5 CSHO Garrett testified on the employee statements taken at the time
6 of the inspection and referenced Exhibit 1, pages 10 through 12. At
7 page 10 Employee #1 admitted he was not tied off and had not installed
8 an additional available anchor point. At page 11 Employee #2 admitted
9 he was not tied off at the time OSHA arrived on the site and there was
10 no anchor point available for attachment. At page 12 Employee #3
11 admitted he had been working on the house all day and utilized a rope
12 for fall protection on the southeast side of the house. He admitted he
13 did not have his lanyard attached. Mr. Garrett observed the lanyard
14 "thrown over a rafter . . . and interpreted the conduct to demonstrate
15 a lack of training or understanding with regard to the use of a fall
16 arrest system . . .".

17 Reference was made to photographs 40 and 40a of Exhibit 1 depicting
18 the two subject employees leaning over the roof edge without fall
19 protection at approximately 10 to 11 feet above ground level.
20 Photographs at Exhibit 1, pages 41 and 41a depicted the employee cutting
21 rafters without a lanyard attached.

22 CSHO Garrett testified he recommended a citation for violation and
23 did not recognize the conduct as an "isolated" incident because
24 employees were on two different houses and separately committed the same
25 violations which the employer knew or should have known were occurring.

26 CSHO Garrett testified Exhibit 1, page 13, the violative conduct
27 could have been prevented with meaningful enforcement because the
28 violations occurred in "plain view" at a low level roof line, so "very

1 apparent . . . and easy to see . . .". The violations were
2 "foreseeable" based upon the working conditions and the employers
3 knowledge of previous violations of the same standard confirmed by
4 NVOSHA as a final order. The employer could easily foresee this conduct
5 reoccurring and should have realized its previous safety enforcement
6 measures were not effective. He referenced Exhibit 1, page 55 to
7 establish the previous violation and classification confirmed on January
8 5, 2012. CSHO Garrett further testified with regard to the penalty
9 calculations, the severity, probability, and gravity elements and the
10 appropriateness of the proposed penalty as a repeat/serious violation.

11 On cross-examination Mr. Garrett testified he was directed to the
12 project by his supervisor on a "referral" which is often based on an
13 anonymous complaint. He had no information to identify the source. Mr.
14 Garrett further testified that when he initially drove up to the project
15 he observed potential violative conduct from the street noting one
16 employee without tie off. He estimated he was approximately 30 to 40
17 yards away at the time of that initial observation. He reconfirmed his
18 observation of three DNA employees working on the Lot 79 roof noting the
19 two employees at the front found in violation. When he went around to
20 the back of the structure he observed a DNA third employee who was
21 actually tied off.

22 At the conclusion of the complainant's case the respondent
23 presented testimony and evidence from Messrs. David Ziegler and Mr.
24 Nester Soto.

25 Mr. Ziegler identified himself as the president and owner of
26 respondent DNA Carpentry and testified with regard to the company safety
27 program, enforcement practices and training regimen. He identified Mr.
28 Nester Soto as the new safety representative hired by the company to

1 increase compliance, particularly for fall protection which is a
2 recognized problem in framing work with employees paid under a "piece
3 work" system. He described the company safety plan progressive
4 enforcement policy and the system for imposing monetary fines. He
5 identified and testified with regard to the samples of fines imposed on
6 employees at Exhibit A. He explained that fines must be reasonable
7 because if they are too high employees will simply leave the company and
8 work elsewhere. He expressed concerns over higher fines and
9 terminations under fair compliance requirements with the Nevada State
10 Department of Labor.

11 Mr. Ziegler explained the company practices for employee
12 supervision. He testified that supervisors were "dedicated" meaning
13 they are not "swinging a hammer"; their main job responsibility is
14 supervision. He testified there is a DNA foreman on each job site a
15 majority of the time. When asked why he retained a safety coordinator,
16 he answered that "SCATS" suggested a need to assure employee safety and
17 a specialist hire would be a reasonable effort to improve the company
18 safety program.

19 On cross-examination Mr. Ziegler testified that in addition to
20 "write-ups" and fines, employees must be retrained under the company
21 safety plan. There are no "degrees of infractions" rather just a first,
22 second and third progressive disciplinary system. Mr. Ziegler testified
23 he had never fired anyone just for safety violations.

24 Respondent presented witness testimony for Mr. Nester Soto who
25 identified himself as the safety coordinator for the company hired by
26 the respondent in November 2013. He described his education and degree
27 in civil engineering, OSHA experience, training, the company safety plan
28 and his policies for employee safety enforcement and training. He

1 testified the reason the company has experienced non-compliance in the
2 fall arrest area as due to employees ". . . simply not paying attention
3 as opposed to any lack of appropriate training; the biggest safety
4 problem is that DNA employees are experienced and have been . . . doing
5 things their way for a long time . . .". He testified his is focused
6 on changing of a general experienced employee "culture" of occasionally
7 avoiding safety compliance.

8 On cross-examination Mr. Soto responded to questions explaining the
9 progressive steps of the disciplinary plan. He identified Exhibit A,
10 page 13 showing the results of a typical first violation and the
11 supervisory employees involved in the disciplinary and monetary fine
12 process. When questioned as to the notice at page 8 of Exhibit A
13 demonstrating the same employee with a previous violation was treated
14 as a first offense, Mr. Soto explained he "gave a break . . . because
15 he personally had not trained that employee on the specific issue and
16 therefore did not impose the monetary fine."

17 Mr. Soto testified there were five separate employees referenced
18 on notices of violation in Exhibit A all for not establishing sufficient
19 anchor points at appropriate locations. Counsel asserted that it looks
20 odd and questioned whether this was evidence of a lack of training. Mr.
21 Soto responded that he retrained the employees and explained his
22 approach.

23 At the conclusion of evidence and testimony, both counsel presented
24 closing argument.

25 Complainant asserted the burden of proof was met by a preponderance
26 of evidence through the photographic exhibits admitted in evidence, the
27 witness statements, and the unrebutted CSHO observations and testimony
28 which clearly established the elements of violation as required under

1 occupational safety and health law. The "employer knowledge" element
2 was confirmed through evidence showing the employer knew or should have
3 known of the conditions because they were "foreseeable" in the industry
4 and DNA is well aware from previous citations it has an issue of
5 experienced employee laxity for compliance with tie-off protection. That
6 knowledge is imputed under occupational safety and health law.
7 Additionally, the personal involvement of Mr. Ziegler in company
8 operations and now those of a specialty designated safety inspector Mr.
9 Soto corroborate the respondent knowledge element.

10 Counsel asserted the violation was not "isolated" because all
11 respondent witnesses testified that tie-off "is a problem with their
12 employees and the culture of piece work." Employees tend to go too fast
13 and avoid respecting tie-off requirements. So the violations are
14 foreseeable, within the employers knowledge, and/or imputed. The
15 company has a recognized problem with supervising safety for over 100
16 employees, because it still incurs citations for the same violations.

17 Counsel further argued there was insufficient proof offered by
18 respondent to establish the recognized four elements required for the
19 defense of employee misconduct. Counsel acknowledged the employer has
20 safety work rules but deviations are regularly happening and demonstrate
21 a lack of "meaningful enforcement and training." The proof of
22 "effective communication" was not established; notably there was no
23 clear process for imposing discipline as demonstrated by the testimony
24 of Mr. Soto. She further argued that after four OSHA fall hazard
25 citations, the respondent employees are still violating the same
26 standard. Counsel asserted the disciplinary program is more
27 "discretionary versus mandatory" which further demonstrates a lack of
28 meaningful enforcement of the work rules. The company is not

1 undertaking reasonable "steps to discover violations . . .". The fact
2 that there were multiple violations of the same standard on different
3 houses under construction shows it was more than "isolated" to one brief
4 incident.

5 This company needs to do something different and the evidence shows
6 the violative conduct is not being addressed nor was the defense of an
7 isolated incident of employee misconduct proven.

8 The respondent presented closing argument and asserted the defense
9 of employee misconduct was proven by the testimony and evidence in the
10 record. Counsel argued that individual employees are responsible for
11 their own actions. "Employers can only do what is reasonable . . .".
12 The management of safety is difficult with 116 employees in the company.
13 In the framing industry with piece work compensation employees will
14 occasionally avoid strict tie off compliance to work faster. The
15 evidence shows the company is safety conscious. Firing employees who
16 occasionally violate basic safety protection is not an answer because
17 they will simply go to work for another company, or employers will go
18 out of business because they can't retain experienced workers. Counsel
19 referenced the testimony and evidence on the company training program,
20 safety practices, enforcement and asserted every reasonable effort is
21 being made to find violative conduct when it occurs. "When is it ever
22 going to be enough for OSHA . . .?" SCATS has been brought into DNA
23 projects twice. They have been unable to provide any further assistance
24 on what might be done to improve the safety program to completely stop
25 all occasional violative conduct. With 116 employees and only a few
26 infractions should show in and of itself the company is successful in
27 what it's doing. The evidence in the record proves numerous instances
28 of discipline to DNA employees. Just because some violations occur with

1 116 employees working 40 hours a week should not provide the basis or
2 any inference of a lack of enforcing safety policy.

3 In reviewing the testimony, documents and exhibits including
4 arguments of counsel, the board is required to measure the evidence
5 against the required elements to establish violations under Occupational
6 Safety & Health Law based upon the statutory burden of proof and
7 competent evidence.

8 In all proceedings commenced by the filing of a
9 notice of contest, the burden of proof rests with
the Administrator. (See NAC 618.788(1)).

10 All facts forming the basis of a complaint must be
11 proved by a preponderance of the evidence. See
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD
12 ¶16,958 (1973).

13 A "serious" violation is established in accordance with NRS
14 618.625(2) which provides in pertinent part:

15 . . . a serious violation exists in a place of
16 employment if there is a substantial probability
17 that death or serious physical harm could result
18 from a condition which exists or from one or more
19 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.

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

24 To prove a violation of a standard, the Secretary
must establish (1) the **applicability** of the
25 standard, (2) the existence of **noncomplying**
26 **conditions**, (3) **employee exposure** or access, and
(4) that the **employer knew or with the exercise of**
27 **reasonable diligence** could have known of the
violative condition. See *Belger Cartage Service,*
28 *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

1 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
2 (No. 76-1408, 1979); *American Wrecking Corp. v.*
3 *Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

4 A respondent may rebut allegations by showing:

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

10 To establish a **Repeat** violation the complainant must provide
11 evidence of a substantially similar violation confirmed in a final
12 order. *Modem Cont'l Constr. Co.*, 19 OSH Cases 2033, 2038 (Rev. Comm'n
13 2002). *Hackensack Steel Corp.*, 20 OSH Cases 1387, 1392-93 (Rev. Comm'n
14 2003); *Secretary of Labor v. Active Oil Serv.*, 21 OSH Cases 1185, 1189
(Rev. Comm'n 2005)

15 The Board finds the complainant evidence met the burden of proof
16 of to establish the violation at Citation 1, Item 1. The respondent
17 failed to meet its burden of proof to rebut the finding of violation
18 through the defense of an isolated incident of **unpreventable employee**
19 **misconduct**. The burden of proof rests with OSHA under Nevada law (NAC
20 618.788); but after establishing same, the burden shifts to the
21 respondent to prove any recognized defenses. See *Jensen Construction*
22 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10
23 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

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

- 26 (1) The employer must establish **work rules**
27 designated to prevent the violation
- 28 (2) The employer must **adequately communicate** these
rules to its employees

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

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

4 In the subject case, the evidence was undisputed the employer had
5 **established work rules** designed to prevent the violation. However there
6 was insufficient preponderant evidence to prove the remaining defensive
7 elements of adequate communication, reasonable steps to discover
8 violations, and effective enforcement of the company work rules.

9 Repeated violations of the same standard by company employees
10 permits a reasonable inference the employer work rules were not
11 meaningfully communicated or effectively enforced.

12 Mr. Soto's testimony reflected equivocal and/or non-uniform
13 consequences for employee violative conduct. The evidence demonstrated
14 a company failure to undertake reasonable steps to discover violations
15 of the cited standard and/or enforce the work rules under a clear and
16 uniform progressive disciplinary program. Neither the documentary
17 evidence nor the testimony of Messrs. Ziegler and Soto were sufficient
18 to rebut the evidence of violation.

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

28 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. (emphasis added)

While no employer can police every moment of an employee's work day to guarantee compliance, the settled case law requires more meaningful and effective action than demonstrated from the evidence submitted by respondent. Even the respondent witnesses appeared resigned to an inability to achieve recognition of compliance with the standard.

The incident cannot be classified as "isolated employee misconduct". Here the same violation subject of previous citations occurred on the same day at two separate buildings. The Board cannot accept the argument the violative conduct is not "foreseeable". Continued violation of the same standard creates a lawful inference that speaks for itself. The employer has knowledge of this culture and condition in its workplace yet cannot eliminate the violative conduct. It appears the cadre of employees working on "piece work" realize they can produce high results as experienced employees but avoid the rules and not suffer any substantial monetary penalties, termination of

1 employment, or other **meaningful** disciplinary action. While meaningful
2 strict enforcement is perhaps painful to the employer on a short run,
3 it would send a clear message through the employee ranks that violations
4 are not acceptable nor tolerated by the respondent.

5 Repeated serious violations are not readily confirmed by this
6 Board. There are substantial negative impacts of repeat violations to
7 any Nevada employers work history and record. Yet there appears no
8 alternative given the evidence and applicable law than to confirm the
9 violation.

10 Based upon facts, evidence and testimony, it is the decision of the
11 **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of
12 Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR
13 1926.501(b)(13), the Repeat classification confirmed, and the proposed
14 penalty in the amount of \$15,400.00 approved.

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

25 DATED: This 5th day of November 2014.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 By /s/
JOE ADAMS, CHAIRMAN