

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,

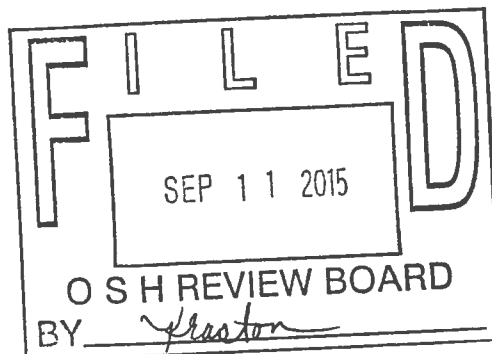
Docket No. LV 15-1778

Complainant,

vs.

10 COOPER ROOFING AND SOLAR, LLC,

Respondent.
11
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 August
16 2015, in furtherance of notice duly provided according to law, MS. SALLI
17 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
18 **Administrative Officer of the Occupational Safety and Health**
19 **Administration, Division of Industrial Relations (OSHA)**; and MR. JOHN
20 GEORGE, ESQ. appearing on behalf of Respondent, **COOPER ROOFING AND**
21 **SOLAR**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as
22 follows:

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

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

28 Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(13)

1 as follows:

2 **Citation 1, Item 1, 29 CFR 1926.501(b)(13):** "Residential
3 construction." Each employee engaged in residential
4 construction activities 6 feet (1.8 m) or more above lower
5 levels shall be protected by guardrail systems, safety net
6 system, or personal fall arrest system unless another
7 provision in paragraph (b) of this section provides for an
8 alternative fall protection measure. Exception: When the
9 employer can demonstrate that it is infeasible or creates a
10 greater hazard to use these systems, the employer shall
11 develop and implement a fall protection plan which meets the
12 requirements of paragraph (k) of 1926.502.

8 At the Monte Bello at Summerlin project, employees engaged in
9 residential construction activities more than six feet above
10 a lower level without being protected by a guardrail system,
11 safety net system or personal fall arrest system. The
12 employees were located on the roof getting their harness and
13 securing sheet metal. This exposed employees to a potential
14 fall hazard of approximately eleven feet above the lower
15 level with potentially serious bodily harm like broken bones
16 or paralysis.

13 Cooper Roofing & Solar, LLC was previously cited for a
14 violation of the same occupational safety and health standard
15 equivalent at 29 CFR 1926.1926.501(b)(10), which was
16 contained in OSHA inspection number 316847375, citation
17 number one, item number one and affirmed as a final order on
18 September 17, 2014.

17 The violation was classified as **Repeat/Serious**. The proposed
18 penalty for the alleged violation is in the amount of EIGHT THOUSAND
19 DOLLARS (\$8,000.00).

20 Complainant and respondent stipulated to the admission of
21 documentary evidence at complainant Exhibits 1 through 4.

22 Complainant presented testimony and documentary evidence with
23 regard to the alleged violation. Nevada CSHO Mr. Tristin Dressler
24 provided photographs identified as exhibits in evidence numbers 53-85.
25 Mr. Dressler did not take part in the investigation but resides near the
26 worksite. He was sworn as a witness and testified his only role in the
27 matter involved providing the photographs taken from his residential
28 home property. He testified the violative conduct was ". . . observed

1 in public plain view."

2 Compliance Safety and Health Officer (CSHO) Mr. Eric Aros testified
3 as to his inspection and the citation issued to the respondent employer.
4 Mr. Aros was directed to the job site based upon information reported
5 to Nevada OSHA by CSHO Tristin Dressler.

6 CSHO Aros formally commenced his inspection on October 1, 2014.
7 He was assisted in his inspection by CSHO Aldo Lizarraga to provide
8 translations for Spanish speaking witnesses. He conducted an opening
9 conference with respondent representatives Mr. Napoleon Mendez, and Ms.
10 Virginia Toalepai, safety consultant of World Wide Safety. Entry to the
11 site was granted by the respondent representatives.

12 CSHO Aros identified the photographic evidence at Exhibit 1, pages
13 53-85. He testified that he observed and photographed respondent
14 employees working without "tie-off" protection in violation of OSHA
15 standards. Referencing photographic Exhibit 1, pages 66-68, Mr. Aros
16 testified he measured the fall hazard exposure distances to demonstrate
17 the application of the cited standard and a potential fall hazard of
18 eleven feet. He testified the standard requires appropriate fall
19 protection where a potential hazard exists of six feet or more.

20 Mr. Aros referenced the witness statement at Exhibit 1, page 17
21 from Mr. Alberto Bautista who identified himself as a "working foreman."
22 He testified the Bautista witness statement in evidence at page 18
23 established the potential fall hazard to be greater than six feet; and
24 respondent employees Martin-Corona and Martin-Martin were not tied off
25 for "about five minutes." Mr. Bautista further reported in his witness
26 statement that "I knew that he wasn't tied off . . . I can send someone
27 home if they aren't tied off." Mr. Aros testified from Exhibit 1, page
28 20, identified as a witness statement from employee Rogaciano Martin-

1 Corona. The statement provided "I was untied for about two minutes
2 because Alberto told me to go get your harness"

3 CSHO Aros continued direct testimony and identified Exhibit 1, page
4 22 as a witness statement from Mr. Martin-Martin. The witness reported
5 in his statement "I was not tied off for five minutes because we were
6 going to climb down" He further referenced the witness statement
7 to provide that "Alberto was on the roof all day with us" Mr.
8 Aros testified that "Alberto" was a reference to Mr. Alberto Bautista,
9 the working foreman. Mr. Aros continued testimony and identified
10 Exhibit 1, page 23 as the witness statement from employee Aldair
11 Iniesta. In the witness statement Mr. Iniesta identified himself as the
12 individual depicted in photograph Exhibit 1, page 69 without tie-off
13 protection. CSHO Aros testified Exhibit 1, page 53 is a photograph of
14 working foreman Bautista on the roof without tie-off protection.

15 Mr. Aros confirmed the previous violation "Final Order" at Exhibit
16 2 as the basis for the **Repeat** classification. He described the proposed
17 penalty and the calculations made in furtherance of the OSHES
18 enforcement manual. He testified there were limited "credits" available
19 because an entire crew was not tied off at the time of inspection, and
20 the respondent employee supervisor admitted he was aware of the non-
21 compliant conditions.

22 Mr. Aros testified he reviewed six months of the respondent
23 employee disciplinary records. At Exhibit 3, page 158 he identified and
24 explained the document as a field form inspection report. He testified
25 the report established an employee on a roof without "tie-off" was not
26 subject of disciplinary action. Mr. Aros noted at Exhibit 3, pages 131-
27 135 the same employee previously involved in the fall hazard safety
28 violation did not receive disciplinary action and was in fact subject

1 of a promotion.

2 On redirect examination Mr. Aros confirmed at Exhibit 1, page 18
3 the Bautista witness statement provided "I can send someone home if he's
4 not tied off" He further testified the photograph at Exhibit 1,
5 page 70 depicts a third employee involved in violative conduct, but not
6 considered part of the subject citation.

7 Respondent conducted cross-examination. CSHO Aros testified a
8 supervisory representative is a person who has the authority to correct
9 or refer violative conduct for action. He testified his interview with
10 foreman Bautista demonstrated that management had knowledge of the
11 violative conditions. He responded to questioning that his finding of
12 employee knowledge was based only upon Mr. Bautista being a supervisory
13 employee in his role as working foreman.

14 Counsel rested the complainant's case. Respondent presented
15 testimonial evidence.

16 Mr. Thomas Donnelly identified himself as the company owner and
17 described the respondent safety plan and policies. He further explained
18 the difficulties involved with maintaining constant supervision of
19 employees on widespread worksites throughout the city, and limited
20 number of supervisors to assure enforcement. Mr. Donnelly testified he
21 is not normally aware of violative conduct and citations given his
22 approximate 210 employees working at multiple worksites. He could only
23 become aware by actually looking at particular disciplinary forms. He
24 testified that his program is proactive and better than most. He
25 further testified that after the previous violation he retained the
26 services of professional safety experts to assist with enforcement
27 through World Wide Safety and Ms. Virginia Toalepai.

28 On cross-examination Mr. Donnelly testified his company

1 disciplinary policy involves a three step process. The first incident
2 results in a "write up," the second results in removal of bonus pay
3 incentives, and a third requires loss of all bonus incentive pay and
4 ultimately termination. Counsel challenged Mr. Donnelly to explain how
5 he might expect foreman Bautista to keep other employees safe if he
6 himself did not comply with tie-off protection. Mr. Donnelly responded
7 that he hired the independent third party safety professionals for
8 oversight and to assist with compliance. He further explained that it
9 was impossible to watch employees every minute of the day; and given the
10 high number of his employees and worksites, the company violative
11 occurrences were minimal.

12 Counsel presented witness testimony from Ms. Virginia Toalepai, the
13 owner of World Wide Safety. She identified herself as a construction
14 safety professional with eight inspectors working for her throughout the
15 city. She conducts eight to ten inspections per day, each consisting
16 of approximately 15 minutes of time. Ms. Toalepai testified she was
17 retained by respondent to provide construction safety compliance
18 oversight and training.

19 On cross-examination Ms. Toalepai described supervisory authority.
20 She testified that if an employee has the authority to remove a person
21 from the worksite, that is a form of discipline and establishes
22 supervisory status.

23 At the conclusion of presentation of evidence and testimony counsel
24 provided closing argument. Complainant asserted the burden of proof was
25 met to establish the violation of the cited standard by a preponderance
26 of evidence. The photographic exhibits clearly depicted and established
27 multiple employee fall hazard exposures. The witness statements
28 confirmed respondent employees admissions of unprotected exposure to the

1 fall hazards. Counsel argued that with foreman Bautista not tied off,
2 as well as the identified employees, proof of employer knowledge of the
3 violative conduct was established constructively through imputation.
4 Foreman Bautista admitted he had management authority by virtue of his
5 right to ". . . send individual's home . . . from the worksite." Ms.
6 Toalepai's testimony supported the employer knowledge proof element by
7 describing removal from the job site as a form of discipline within a
8 supervisor's authority.

9 Counsel asserted that while respondent maintained a safety program
10 and disciplinary plan, the facts and documents in evidence established
11 it was not "meaningfully enforced." Counsel argued the documentary
12 evidence demonstrates that 60% of the "write ups" are for company
13 foremen and ". . . the same people appear to be violating the same fall
14 protection standards" "Red flags are there; . . ." with the
15 foreman awareness and disciplinary records, employer knowledge is
16 clearly established. Counsel asserted the problem may relate to "piece
17 work" compensation. There is little incentive for employers who pay
18 employees based upon the amount of work accomplished to provide extended
19 enforcement for safety which slows down work progress.

20 Respondent presented closing argument. Counsel argued the employer
21 safety policies are in place, but supervision is difficult and cannot
22 involve constant oversight of every employee throughout the day. The
23 respondent hired a third party safety contractor after it received its
24 second citation, but it's not something that can eliminate every
25 infraction because of the size and scope of the employer's operations
26 in Las Vegas. Given the approximate 210 employee average workforce and
27 multiple worksites, the actual history of the respondent should be
28 considered good. Counsel asserted the respondent record of good faith.

1 He noted that in 2010 there were 2 citations, in 2011, 1; 2012, 1; 2013,
2 2; and in 2014 the subject citation. Counsel urged the Board consider
3 the substantial number of employees and thousands of hours worked each
4 year. He argued those statistics should be considered before imposing
5 a repeat violation and excessive monetary penalties on a good faith
6 employer.

7 In considering the testimony, exhibits, and arguments of counsel,
8 the Board is required to review the evidence and established legal
9 elements to prove violations under recognized occupational safety and
10 health law.

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

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

15 Preponderance of the evidence means evidence that
16 enables a trier of fact to determine that the
17 existence of the contested fact is more probable
18 than the nonexistence of the contested fact. NRS
233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*
Board of Nevada, 130 Nev. Adv. Op. No. 27, 327 P.3d
487 (2014)

19 To prove a violation of a standard, the Secretary
20 must establish (1) the applicability of the
21 standard, (2) the existence of noncomplying
conditions, (3) employee exposure or access, and
22 (4) that the employer knew or with the exercise of
23 reasonable diligence could have known of the
24 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);
25 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
26 (No. 76-1408, 1979); *American Wrecking Corp. v.*
Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.
2003).

27 NRS 618.625 provides in pertinent part:

28 ". . . a serious violation exists in a place of
employment if there is a **substantial probability**

1 **that death or serious physical harm could result**
2 **from a condition** which exists, or from one or more
3 practices, means, methods, operations or processes
4 which have been adopted or are in use in that place
 of employment unless the employer did not and could
 not, with the exercise of reasonable diligence,
 know of the presence of the violation."

5 A "**repeat**" violation is established if based upon a prior violation
6 of the same standard, a different standard, or general duty clause, if
7 the present and prior violation is **substantially** similar.

8 A violation is considered a repeat violation:

9 If, at the time of the alleged repeat violation,
10 there was a Commission final order against the
11 employer for a substantially similar violation.
12 *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (no. 16183,
13 1979). A prima facie case of substantial
14 similarity is established by a showing that the
15 prior and present violations were for failure to
16 comply with the same standard. *Superior Electric*
17 *Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597,
18 1996). *Robert B. Reich, Secretary of Labor, United*
19 *States Department of Labor v. D.M. Sabia Company*
20 *and Occupational Safety and Health Review*
21 *Committee*, 90 F.3d 854 (1996); *Caterpillar, Inc. v.*
22 *Alexis M. Herman, Secretary of Labor, and*
23 *Occupational Safety and Health Administration,*
24 *Respondents and United Auto Workers, Local 974,*
25 *Intervenors*, 154 F.3d 400 (1998).

18 A repeated violation may be found based on a prior
19 violation of the **same standard, a different**
20 **standard, or the general duty clause**, but the
21 **present and prior violations must be substantially**
22 similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,
23 1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18
24 OSH Cases 1481 (7th Cir. 1998); *GEM Indus., Inc.*, 17
25 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
26 generally establish its prima facie case of
27 substantial similarity by showing that the prior
28 and present violations are of the same standard.
 The employer may rebut that showing by establishing
 that the violations were substantially different.
 Where the citations involve different standards,
 OSHA must present "sufficient evidence" to
 establish the substantial similarity of the
 violations. A similar showing must be made if the
 citations involve the same standard but the
 standard is broadly worded. Repeated violations
 are not limited to factually identical occurrences.
 Provided that the hazards are similar, minor

1 differences in the way machines work or in the size
2 and shape of excavations will usually not lead to
3 a finding of dissimilarity. In general, the key
4 factor is whether the two violations resulted in
5 substantially similar hazards. It is not necessary,
6 however, that the seriousness of the hazard
7 involved in the two violations be the same.
8 Rabinowitz, Occupational Safety and Health Law, 2nd
9 Ed. 2008 at pp. 230-231. (emphasis added)

6 A respondent may rebut allegations by showing:

- 7 1. The standard was inapplicable to the situation
8 at issue;
- 9 2. The situation was in compliance; or lack of
10 access to a hazard. See, *Anning-Johnson Co.*,
11 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

11 The Board finds from the evidence of record that complainant met
12 the burden of proof to establish the cited violation. The elements of
13 proof to support the finding a violation of the cited standard were met
14 by a preponderance of the evidence.

15 The standard was **applicable** to the facts in evidence. There was
16 no claim or rebuttal to the contrary. The undisputed evidence of the
17 height of the fall hazard to require protection was depicted in the
18 photographic evidence at Exhibit 1; and confirmed through the respondent
19 witness statements.

20 **Non-complying conditions** were established by the observations of
21 CSHO Aros, the respondent witness statements, and photographic exhibits.
22 The employer failed to implement the safety requirements specifically
23 alleged in the cited standard.

24 **Employer knowledge** was proven through the witness statement of
25 foreman Bautista at Exhibit 1, page 17. Mr. Bautista had the authority
26 to require employees to comport with the fall hazard standards as well
27 as the right to remove employees from the worksite. The **employer**
28 **knowledge** proof element is imputed through well settled principles

1 recognized under occupational safety and health law.

2 **Employee exposure** was established through the un rebutted
3 observations of CSHO Aros, the respondent employee witness statements,
4 and the photographic exhibits depicting the employees without fall
5 arrest protection.

6 The undisputed testimonial and documentary evidence established the
7 violative conduct was appropriately classified as **serious** due to the
8 potential injuries to be suffered by an employee falling from a distance
9 of over six feet, and in fact approximately eleven feet at the subject
10 site. The documentary evidence of the **repeat** classification for the
11 cited violation was confirmed by the two previous citations of the same
12 standards in conformance with governing occupational safety and health
13 law.

14 In general, the actual or **constructive knowledge of**
15 **a supervisory employee will be imputed to the**
16 **employer**, and thus constitute a prima facie showing
17 of employer knowledge. Where **supervisory knowledge**
18 **can be imputed**, OSHA need not also show that there
19 were deficiencies in the employer's safety program.
20 *Halmar Corp.*, 18 OSH Cases 1014, 1016-17 (Rev.
Comm'n 1997), *aff'd on other grounds*, 18 OSH Cases
1359 (2d Cir. 1998). *But see L.R. Willson & Sons*
21 *Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases
1129 (4th Cir. 1998), and cases cited therein at
22 footnote 31. Occupational Safety and Health Law, 2nd
23 Ed., Rabinowitz at page 87. (emphasis added)

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

24 The respondent employer knew, or **with the exercise of reasonable**
25 **diligence**, could have known of the violative conditions. All of the
26 violations occurred in **plain view** and under the **supervision of company**
27 **superintendent Bautista.**

28 Complainant's initial burden to prove the violation was met by the

1 un rebutted sworn testimony of CSHO Aros, the photographs in evidence,
2 and the respondent witness statements. The burden of proof to confirm
3 a violation rests with OSHA under Nevada law (NAC 618.788); but after
4 establishing same, **the burden shifts to the respondent to prove any**
5 **recognized defenses.**

6 The respondent did not specifically raise the recognized defense
7 of "unpreventable employee misconduct;" but asserted employee
8 misbehavior and the principles of the defense through the employer
9 safety policy and disciplinary program.

10 However, employee misbehavior, standing alone, does not relieve an
11 employer. Where the Secretary shows the existence of violative
12 conditions, an employer may defend by showing that the employee's
13 behavior was a deviation from a **uniformly and effectively enforced work**
14 **rule, of which deviation the employer had neither actual nor**
15 **constructive knowledge.** *A. J. McNulty & Co., Inc.*, 4 OSHC 1097, 1975-
16 1976 OSHD ¶ 20,600 (1976). (emphasis added)

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).

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

Although there is a similar doctrine of **supervisory**
misconduct, some cases characterize it not as an
affirmative defense but as a rebuttal of the
imputation to the employer of the supervisor's
knowledge. The Commission has stated that

1 involvement by a supervisor in a violation is
2 "**strong evidence that the employer's safety program**
3 **was lax.**" "Where a supervisory employee is
4 involved, the proof of unpreventable employee
5 misconduct is **more rigorous and the defense is more**
6 **difficult to establish since it is the supervisors'**
7 **duty to protect the safety of employees under their**
8 **supervision."** *Daniel Constr. Co.*, 10 OSH Cases
9 1549, 1552 (Rev. Comm'n 1982). *Consolidated*
10 *Freightways Corp.*, 15 OSH Cases 1317, 1321 (Rev.
11 Comm'n 1991). *Seyforth Roofing Co.*, 16 OSH Cases
12 2031 (Rev. Comm'n 1994). Rabinowitz Occupational
13 Safety and Health Law, 2008, 2nd Ed., page 157.
14 (Emphasis added)

15 ". . . (A) **supervisor's knowledge** of deviations
16 from standards . . . is properly **imputed to the**
17 **respondent employer.** . . ." *Division of Occupational*
18 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
19 775 P.2d 701 (1989). (emphasis added)

20 It is well settled that **knowledge, actual or**
21 **constructive, of an employer's supervisory**
22 **personnel** will be **imputed to the employer**, unless
23 the employer establishes **substantial grounds** for
24 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
25 93 CCH OSHD ¶29,254 (No. 85-531 1991). The
26 Commission held that once there is a prima facie
27 showing of employer knowledge through a supervisory
28 employee, the employer can rebut that showing by
establishing that the failure of the supervisory
employee to follow proper procedures was
unpreventable. In particular, the employer must
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).
(emphasis added)

29 Foreman Bautista himself was observed and photographed working
30 without fall protection in violation of the cited standard.

31 "[w]here a **supervising employee is involved**, the
32 proof of unpreventable employee misconduct is more
33 rigorous and the defense is more difficult to
34 establish since it is the supervisor's duty to
35 protect the safety of employees under his
36 supervision." In *Sec'y of Labor v. Westar Energy*,
37 20 BNA OSHC 1736 (OSHC Jan. 6, 2004) (emphasis
38 added)

A further element of proof to support the defense of unpreventable

1 employee misconduct requires preponderant evidence the respondent has
2 **taken steps to discover violations and effectively enforced the rules**
3 **when violations are discovered.** The weight of evidence from the company
4 safety records and disciplinary practice supports a reasonable inference
5 and finding that no meaningful discipline was imposed or reinforced.

6 The facts in evidence clearly establish that foreman Bautista had
7 direct knowledge of the violative conduct while working along side his
8 crew. He could readily observe the violative conduct. The entire crew
9 was in violation of the standard at the time of the CSHO inspection,
10 observations and photographs. The violations of the standard, by
11 multiple employees, occurred in **plain view.**

12 The Board is concerned with the negative impacts upon any Nevada
13 employer cited for a **repeat/serious** violation and subjected to
14 substantial monetary penalties. While regrettable, the facts in
15 evidence under the governing occupational safety and health law leave
16 no alternative. Employee safety and assured compliance must be fully
17 enforced at Nevada worksites. The Board recognizes and compliments the
18 efforts of the respondent employer through recent hiring of the third
19 party safety consultant; however the widespread operations throughout
20 the city and substantial number of working employees require actual
21 **meaningful enforcement** be undertaken to assure compliance, employee
22 safety, and the avoidance of future citations. It is understandable
23 that an employer cannot supervise all of its employees every hour of the
24 day. An accelerated enforcement program **uniformly applied and**
25 **meaningfully enforced** can result in substantial compliance, a safer
26 worksite, and elimination of citations. Evidence of a uniformly applied
27 and meaningfully enforced safety and discipline program is recognized
28 under occupational safety and health law for an employer defense of

1 unpreventable employee misconduct or isolated acts of employee
2 noncompliance. Nevada occupational safety and health law does not
3 require unreasonable enforcement practices, nor impose strict liability
4 on employers. However there must be evidence of a qualified safety
5 program in conjunction with a **meaningfully enforced safety/ disciplinary**
6 **program** to avoid the imposition of citations and more importantly the
7 potential for serious employee injuries.

8 It is the decision of the Nevada Occupational Safety and Health
9 Review Board that a violation of Nevada Revised Statutes did occur as
10 to Citation 1, Item 1, 29 CFR 1926.501(b)(13). The violation was
11 properly classified as Repeat/Serious and the penalty proposed of EIGHT
12 THOUSAND DOLLARS (\$8,000.00) is confirmed.

13 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
14 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION,**
15 **DIVISION OF INDUSTRIAL RELATIONS,** to prepare and 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 11th day of September 2015.

26 NEVADA OCCUPATIONAL SAFETY AND HEALTH
27 REVIEW BOARD

28 /s/

JOE ADAMS, CHAIRMAN