

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

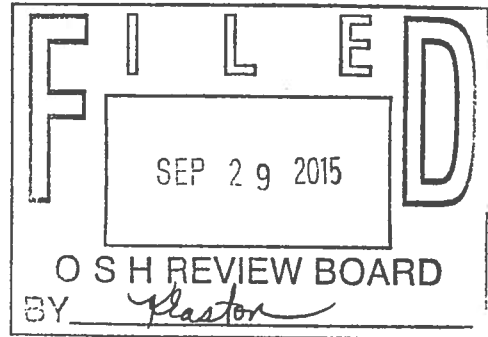
Docket No. LV 15-1784

Complainant,

vs.

9 DAVE PETERSON FRAMING, INC.,

Respondent.



11 _____/
12 **DECISION**

13 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
14 **REVIEW BOARD** at a hearing commenced August 11, 2015, in furtherance of
15 notice duly provided according to law. MS. SALLI ORTIZ, ESQ., counsel
16 appearing on behalf of the Complainant, **Chief Administrative Officer of**
17 **the Occupational Safety and Health Administration, Division of**
18 **Industrial Relations** (OSHA). Mr. Dave Peterson, President appearing on
19 behalf of Respondent, **Dave Peterson Framing, Inc.**

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

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

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

27 "Unprotected sides and edges." Each employee on a
28 walking/working surface (horizontal and vertical
surface) with an unprotected side or edge which is
6 feet (1.8 m) or more above a lower level shall be

1 protected from falling by the use of guardrail
2 systems, safety net systems, or personal fall
3 arrest systems.

4 Complainant alleged that at a McDonald's restaurant
5 worksite in Henderson, Nevada an employee was
6 installing wood on top of a parapet wall without a
7 personal fall arrest system, exposing him to a fall
8 hazard of approximately 11 feet. The roof was not
9 equipped with a guard rail.

10 The violation was classified as **Repeat-Serious**. The
11 proposed penalty was in the amount of One Thousand
12 Six Hundred Dollars (\$1,600.00).

13 The respondent was previously cited for the same
14 standard which was contained in OSHA Inspection
15 Number 316839414, Citation 1, Item 1. The **final**
16 **order** date of the citation was March 7, 2013.

17 The parties stipulated to the admission of evidence identified as
18 complainant's Exhibits 1 through 6 and respondent's A, B and C.

19 Counsel for the complainant presented evidence and testimony in
20 support of the violation, and appropriateness of the classification and
21 penalty.

22 Compliance Safety and Health Officer (CSHO) Mr. Aldo Lizarraga
23 testified he received a referral complaint on October 17, 2014 and
24 inspected the respondent worksite at the McDonald's restaurant located
25 at 701 East Horizon Drive, Henderson, Nevada. He observed an employee
26 working on the roof when he arrived at the worksite and took photographs
27 to document the lack of a safety harness, or any other fall arrest
28 protection. Mr. Lizarraga identified and explained the photographic
evidence at Exhibit 1, pages 43-50. He referenced his narrative report
at Exhibit 1, page 9 and testified accordingly. During the inspection
he identified Mr. Francisco Tarango, as the employee of Dave Peterson
Framing, observed installing strips of wood at the top of a parapet wall
on the north side of the building roof. The employee was exposed to a
potential fall hazard of approximately eleven feet. From his

1 investigation, Mr. Lizarraga determined the employee was assigned the
2 task of installing 2" x 2" wood strips on top of the parapet wall by
3 respondent foreman Mr. Roberto Valadez. CSHO Lizarraga confirmed from
4 the employer records the exposed employee, Mr. Tarango, received fall
5 protection training on September 5, 2014. Mr. Lizarraga testified
6 respondent foreman Valadez informed him that he (Valadez) directed Mr.
7 Tarango to perform the roof work, not remembering whether the employee
8 was tied off. Mr. Valadez reported it was his (Valadez) "fault because
9 I did not inspect the height of the parapet wall on the high roof."

10 Mr. Lizarraga testified the photographs of the roof at Exhibit 1,
11 pages 46 through 48, confirm there was no harness or other fall
12 protection equipment. Photographic exhibit 49a depicted a measuring
13 tape against the wall to establish the height of the parapet at
14 approximately 28-1/2". The wall did not meet the height requirements
15 to satisfy the OSHA standard for fall arrest protection. He described
16 the probable serious injuries from a potential fall at a distance of
17 approximately eleven feet over the parapet wall. Mr. Lizarraga
18 confirmed the referenced standard cited required fall protection from
19 any height six feet or more.

20 CSHO Lizarraga testified the documentary evidence of the previous
21 violation at Exhibit 2 was relied upon to establish the **Repeat**
22 classification as confirmed in a **final order** on March 7, 2013. He found
23 all the elements required to support a violation based upon the height
24 of a potential fall, the applicability of the referenced standard, lack
25 of any fall arrest protection, and exposure of an employee working
26 within the knowledge of the foreman.

27 Mr. Lizarraga testified employee Tarango reported he was in a hurry
28 to finish the job so did not use fall protection and explained he only

1 worked at the parapet wall area for a few minutes.

2 On cross-examination Mr. Lizarraga described his calculation of the
3 fall height hazard at eleven feet, and referenced the tape measurement
4 photograph in evidence at Exhibit 1, page 49. He estimated the fall
5 distance from the top of the parapet wall to the lower roof at eleven
6 feet, which exceeded the six foot requirement for protection under the
7 cited OSHA standard.

8 Respondent representative questioned why the scaffolding around the
9 building was not considered effective fall protection for the employee.
10 CSHO Lizarraga responded the scaffolding was not an issue at the cited
11 north wall side where employee Tarango was observed working.

12 Respondent representative questions to CSHO Lizarraga conceded
13 there was no scaffolding on top of the lower roof on the north side to
14 arrest a fall hazard. He asked "Q. Yeah, but, how much of that time
15 - from the high roof to the low roof where the parapet wall, which is
16 - **which doesn't have scaffolding?** A. North side. Q. Yeah, the north
17 side, how much of that time to do you figure he was working there?"
18 (emphasis added, Tr. p. 36, lines 11-16)

19 On redirect examination, CSHO Lizarraga testified ". . .
20 scaffolding can be adequate protection . . . if it meets (OSHA)
21 requirements" He further testified the scaffolding observed at
22 the site would not meet OSHA requirements for the cited respondent. It
23 was not erected by respondent nor under its control, therefore not
24 recognized as protection for the respondent employee under occupational
25 safety and health enforcement guidelines. CSHO Lizarraga explained the
26 guidelines prohibiting "adopted use" of another employer's equipment,
27 but testified there was no citation for the respondent employee working
28 at other areas of the roof where scaffolding was in place.

1 Complainant rested the NVOSHA case. Respondent presented no
2 witnesses but reserved the right to closing argument and reference to
3 Exhibits A through C in evidence.

4 Complainant presented closing argument. The complainant asserted
5 the burden of proof was met to establish the cited violation.
6 Respondent employee Tarango was depicted in the photographic evidence
7 and admitted he was working without personal fall protection. The
8 photographs in evidence confirmed Mr. Tarango was exposed to a fall
9 hazard requiring protection under the cited standard. Counsel asserted
10 there was ". . . no recognized external protection in place . . ." at
11 the parapet wall area where the employee was observed and admittedly
12 working. The scaffolding subject of testimony is no defense because it
13 was not the property of respondent. OSHA does not permit the
14 scaffolding equipment of another employer to be recognized fall
15 protection under an "adopted use." Without any respondent control over
16 the equipment, it could be moved at any time by the owner leaving no way
17 for the employer or employees to assure reliable protection from an
18 exposed fall hazard.

19 Respondent presented closing argument. The respondent argued his
20 contract work involved only application of a facade on the outside of
21 the building and was performed exclusively from a forklift. He
22 asserted there was no requirement for other fall protection for his job
23 work. The identified employee subject of testimony and photographic
24 exhibits was actually protected from the roof area fall hazards by the
25 scaffolding in place. He argued the employee work on the parapet wall
26 (north side) consisted of only about five minutes time placing a 2" x
27 2" board on top of the wall to bring the parapet to a height required
28 by the contract specifications. He further argued there was a scaffold

1 on the remaining exterior sides of the building, even though it was not
2 his, the employee was not exposed to an unprotected fall hazard.

3 Respondent argued the previous violation subject of the repeat
4 classification was his first citation. He asserted it was based upon
5 employee misconduct because an individual unhooked and the company
6 superintendent didn't see it. The employee was not near the edge when
7 he detached his harness, but determined not economically worthwhile to
8 contest the citation. The fine was paid, the employee involved
9 rescheduled for training, and the incident treated as a "learning tool."
10 Respondent further argued ". . . you cannot watch every employee every
11 minute . . . these citations involve burdensome risks particularly when
12 not realistic . . ." Respondent concluded arguing ". . . you cannot
13 build in this city if you follow OSHA 100% because it makes working
14 impossible . . . ;" and asserted his efforts toward safety compliance.

15 To find a violation of the cited standard, the Board must consider
16 the evidence and measure same against the established applicable law
17 promulgated and developed under the Occupational Safety & Health Act.

18 In all proceedings commenced by the filing of a
19 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

20 All facts forming the basis of a complaint must be
21 proved by a preponderance of the evidence. *Armor*
Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958
22 (1973).

23 Preponderance of the evidence means evidence that
24 enables a trier of fact to determine that the
25 existence of the contested fact is more probable
26 than the nonexistence of the contested fact. NRS
27 233B, Sec. 2. *Nassiri v. Chiropractic Physicians'*
Board of Nevada, 130 Nev. Adv. Op. No. 27, 327 P.3d
28 487 (2014)

To establish a prima facie case, the Secretary
(Chief Administrative Officer) must prove 1) the
cited standard applies; 2) the requirements of the
standard were not met; 3) employees **were exposed** to

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

12 A "serious" violation is established upon a preponderance of
13 evidence in accordance with NRS 618.625(2) which provides in pertinent
14 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**
20 **which have been adopted or are in use at that place**
21 **of employment unless the employer did not and could**
22 **not, with the exercise of reasonable diligence,**
23 **know the presence of the violation.** (emphasis
24 added)

25 A violation is considered a **repeat** violation:

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

A repeated violation may be found based on a prior
violation of the same standard, a different
standard, or the general duty clause, but the
present and prior violations must be substantially
similar. *Caterpillar, Inc.*, 18 OSH Cases 1005,
1006 (Rev. Comm'n 1997), *aff's*, 154 F.3d 400, 18

1 OSH Cases 1481 (7th Cir. 1998); GEM Indus., Inc., 17
2 OSH Cases 1861, 1866 (Rev. Comm'n 1996). OSHA may
3 generally establish its prima facie case of
4 substantial similarity by showing that the prior
5 and present violations are of the same standard.
6 The employer may rebut that showing by establishing
7 that the violations were substantially different.
8 Where the citations involve different standards,
9 OSHA must present "sufficient evidence" to
10 establish the substantial similarity of the
11 violations. A similar showing must be made if the
12 citations involve the same standard but the
13 standard is broadly worded. Repeated violations
14 are not limited to factually identical occurrences.
15 Provided that the hazards are similar, minor
16 differences in the way machines work or in the size
17 and shape of excavations will usually not lead to
18 a finding of dissimilarity. In general, the key
19 factor is whether the two violations resulted in
20 substantially similar hazards. It is not necessary,
21 however, that the seriousness of the hazard
22 involved in the two violations be the same.
23 Rabinowitz, Occupational Safety and Health Law, 2nd
24 Ed. 2008 at pp. 230-231.

25 A respondent may rebut allegations by showing:

- 26 1. The standard was inapplicable to the situation
27 at issue;
- 28 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).
(emphasis added)

1 The Board finds preponderant evidence of employee hazard exposure
2 and the required elements to satisfy the burden of proof to support a
3 finding of the repeat/serious violation at Citation 1, Item 1,
4 referencing 29 CFR 1926.501(b)(1).

5 The critical proof element to establish violation of a cited OSHA
6 standard is **employee exposure or access** to a workplace hazard. The fall
7 hazard condition at the worksite on the **north** side of the building
8 subject of the citation was not abated by any fall arrest system,
9 including scaffolding. The evidence demonstrated the south side and
10 other building roof locations were arguably protected by the existing

1 scaffolding erected by another employer as **alternate compliance**.
2 However, on the **north side** subject of citation there was no scaffolding
3 on the lower roof to arrest a fall over the top of the parapet wall
4 where employee Tarango was admittedly working. The testimony and
5 documentary evidence established the **respondent employee** was exposed to
6 a potential fall hazard which could result in serious injury or death.
7 Accordingly, the worksite conditions were **not in compliance**.

8 There is no dispute the standard was **applicable** to the facts in
9 evidence. **Employer knowledge** was subject of proof through the witness
10 statement of foreman Roberto Valadez, including his admission of having
11 directed employee Tarango to perform the subject work on the parapet
12 wall on the unprotected north side. Mr. Valadez admitted he did not
13 consider the need for any fall arrest protection. The **employer**
14 **knowledge** proof element is imputed through a supervisory employee under
15 well-settled case law principles established in occupational safety and
16 health law.

17 The undisputed testimonial and documentary evidence established the
18 violative conduct was appropriately classified as **serious** due to the
19 potential injuries likely to be sustained by an employee falling from
20 a distance of over six feet, and in fact approximately eleven feet at
21 the subject site work area. The documentary evidence supported the
22 **repeat** classification for the cited violation based upon a **Final Order**
23 for previous violation of the same standards.

24 In general, the actual or **constructive knowledge of**
25 **a supervisory employee will be imputed to the**
26 **employer**, and thus constitute a prima facie showing
27 of employer knowledge. Where **supervisory knowledge**
28 **can be imputed**, OSHA need not also show that there
were deficiencies in the employer's safety program.
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*

1 *Inc. v. OSHRC*, 134 F.3d 1235, 1240-41, 18 OSH Cases
2 1129 (4th Cir. 1998), and cases cited therein at
3 footnote 31. *Occupational Safety and Health Law*, 2nd
4 Ed., Rabinowitz at page 87. (emphasis added)

5 ". . . (A) **supervisor's knowledge** of deviations
6 from (OSHA) standards . . . is properly **imputed to**
7 **the respondent employer.** . . ." *Division of*
8 *Occupational Safety and Health vs. Pabco Gypsum*,
9 105 Nev. 371, 775 P.2d 701 (1989). (emphasis added)

11 The respondent employer knew, or **with the exercise of reasonable**
12 **diligence**, could have known of the violative conditions. The cited
13 violation occurred in **plain view** and under the **supervision of respondent**
14 **foreman Roberto Valadez.**

15 The respondent did not specifically raise the recognized defense
16 of **unpreventable employee misconduct**, but asserted employee misbehavior
17 and the principles of the defense referencing the employer safety policy
18 and disciplinary program.

19 However, employee misbehavior, standing alone, does not relieve an
20 employer. Where the Secretary shows the existence of violative
21 conditions, an employer may defend by showing that the employee's
22 behavior was a deviation from a **uniformly and effectively enforced work**
23 **rule, of which deviation the employer had neither actual nor**
24 **constructive knowledge.** *A. J. McNulty & Co., Inc.*, 4 OSHC 1097, 1975-
25 1976 OSHD ¶ 20,600 (1976). (emphasis added)

26 An employer has the **affirmative duty to anticipate and protect**
27 **against preventable hazardous conduct by employees.** *Leon Construction*
28 *Co.*, 3 OSHC 1979, 1975-1976 OSHD ¶ 20,387 (1976).

29 It is well settled that **knowledge, actual or**
30 **constructive, of an employer's supervisory**
31 **personnel will be imputed to the employer**, unless
32 the employer establishes **substantial grounds** for
33 not doing so. *Ormet Corp.*, 14 BNA OSHC 2134, 1991-
34 93 CCH OSHD ¶29,254 (No. 85-531 1991). The
35 Commission held that once there is a prima facie

1 showing of employer knowledge through a supervisory
2 employee, the employer can rebut that showing by
3 establishing that the failure of the supervisory
4 employee to follow proper procedures was
5 **unpreventable**. In particular, the employer must
6 establish that it had relevant work rules that it
7 adequately communicated **and effectively enforced**.
8 *Consolidated Freightways Corp.*, 15 BNA OSHC 1317,
9 1991-93 CCH OSHD ¶29,500 (No. 86-531, 1991).
10 (emphasis added)

11 The evidence confirmed the foreman in this case, Roberto Valadez,
12 was the same foreman involved in the previous citation for violation
13 which caused the current citation to be classified as a **Repeat**
14 violation. With the same fall safety hazard violation, and supervisory
15 employee foreman Valadez involved, the legal inference is that
16 respondent's safety rules are not subject of reasonable steps for
17 **discovery of violations** nor work rules **effectively enforced**.

18 The Commission has stated that involvement by a
19 supervisor in a violation is "**strong evidence that**
20 **the employer's safety program was lax.**" "Where a
21 supervisory employee is involved, the proof of
22 unpreventable employee misconduct is **more rigorous**
23 **and the defense is more difficult to establish**
24 **since it is the supervisors' duty to protect the**
25 **safety of employees under their supervision.**"
26 *Daniel Constr. Co.*, 10 OSH Cases 1549, 1552 (Rev.
27 Comm'n 1982). *Consolidated Freightways Corp.*, 15
28 OSH Cases 1317, 1321 (Rev. Comm'n 1991). *Seyforth*
Roofing Co., 16 OSH Cases 2031 (Rev. Comm'n 1994).
Rabinowitz Occupational Safety and Health Law,
2008, 2nd Ed., page 157. (Emphasis added)

29 The facts, documentary and testimonial evidence leave this Board
30 with no option but to find and confirm the repeat serious violation as
31 cited and approve the proposed penalty. While the Board is always
32 reluctant to find any Nevada employer responsible for a **Repeat/Serious**
33 violation and approve the resultant substantial monetary penalties,
34 there is no alternative when the evidence is compelling, the citation
35 the same, and additionally here the same foreman previously responsible

