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,

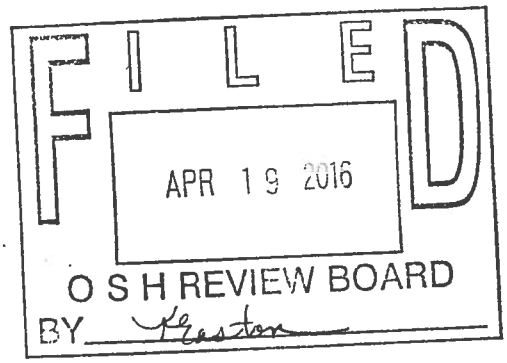
vs.

THE ORIGINAL ROOFING COMPANY, LLC,

Respondent.

_____/

Docket No. LV 16-1830



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 9th day of March 2016, in furtherance of notice duly provided according to law, MS. SALLI ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. DON KELLY, SAFETY MANAGER, appearing on behalf of Respondent, **The Original Roofing Company, LLC**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

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

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

Citation 1, Item 1, charges a violation of 29 CFR 1926.501(b)(11) which provides:

> 29 CFR 1926.501(b)(11): "Steep roofs." Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems.

NVOSHA alleged that at the Canyon Ridge Apartments, The Original Roofing Company, LLC employees were performing roofing activities on a steep roof (slope of 5/12) without any means of fall protection in place. Without fall protection, employees were exposed to a fall hazard of approximately 23 feet and 1 ¾ inches. Employees were exposed to serious injuries in the event of a fall to the rocks and dirt below.

The Original Roofing Company, LLC was previously cited for a violation of this occupational safety and health standard which was contained in OSHA inspection number 316841196, Citation 01, Item 001. The Final Order date of this inspection was 6-17-13.

The violation was classified as "Repeat-Serious." The proposed penalty for the alleged violation is in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

Complainant and respondent stipulated to the admission of documentary evidence at complainant Exhibits 1, 2 and 3; and Respondent's Exhibit A.

Complainant presented testimony and documentary evidence with regard to the alleged violation through Mr. Aldo Lizarraga, Compliance Safety and Health Officer (CSHO). He testified as to his findings and the citation issued to the respondent employer.

On or about July 22, 2015 CSHO Lizarraga conducted an inspection at the Canyon Ridge Apartments jobsite in Henderson, Nevada. The project involved multi-employers and employees engaged in a variety of

construction activities, including framing, insulation, electrical, plumbing, roofing and drywall work. Mr. Lizarraga identified various hazards in a "walk around" inspection and met with appropriate employer representatives. He observed and photographed employees of the respondent, Original Roofing Company, performing roofing activities on a steep roof without any means of fall protection in place. CSHO Lizarraga interviewed the identified respondent employees Messrs. Betancourt and Cortez. He referenced Exhibit 1, pages 33 and 34, and testified as to the interviews and written statements. Respondent employee Mr. Silverio Betancourt admitted he was "not tied off for approximately 20 minutes . . .." Foreman employee Jose Cortez admitted and signed a statement confirming his lack of tie-off protection, as well as that of Mr. Betancourt.

Mr. Lizarraga referenced the Exhibit 1 inspection report and confirmed the photos he obtained at the jobsite specifically at Exhibit 1, pages 61, 62 and 63A. He identified the employees of respondent depicted as exposed to the hazards in the photographs. The job foreman, Mr. Jose Cortez admitted during the interview and inspection that he was aware employee Betancourt was exposed to fall hazards due to lack of "tie off" protection, and acknowledged he too was exposed for failure to comply with the fall arrest standards. He admitted he was in charge of the crew consisting of himself and another roofer. They were "chalking" the roof before installing roof tiles. Mr. Cortez stated it was easier to chalk the lines without personal fall arrest and admitted both employees were untied for approximately 15 minutes.

CSHO Lizarraga confirmed the previous violation of record referenced in Exhibit 1, page 68 and testified it to be the basis for classifying the current citation "Repeat/Serious."

On cross-examination by respondent representative Kelly, CSHO Lizarraga testified he determined the company was aware of the lack of tie off because foreman Cortez admitted he knew of the non-compliant conditions and he himself was also not tied off. Mr. Lizarraga testified the hazard exposure to the two employees was both admitted in their written statements and corroborated through the photographs. He found no other violations against the respondent employer at the time of the initial inspection nor after reinspection.

Mr. Lizarraga testified that during interviews both employees admitted receiving respondent fall protection training and their awareness of the company safety policies. When asked whether he believed the respondent put employees on the site without fall protection equipment, Mr. Lizarraga testified that he observed employees not wearing the protection but saw an individual with a bucket that may have contained safety equipment. When asked if he felt the foreman chose not to tie off, he testified ". . . yes, because the foreman himself and the employee he supervised were both not in compliance with the fall arrest standards . . .."

At the conclusion of complainant's case, respondent representative Kelly informed the Board he would not be presenting any witnesses but rely upon the defense of employee misconduct and the documentary evidence stipulated in evidence at Exhibit A. He reserved the right to offer closing argument.

Complainant presented closing argument. Counsel asserted the facts and evidence of violation were clearly established; and not rebutted or denied as the respondent relies upon the defense of employee misconduct. Counsel argued the defense is not available to the respondent without evidence of a safety program which is meaningfully enforced and

communicated. Counsel referenced the supervisor's lack of tie off personally and requested the Board take judicial/administrative notice of the recent Nevada Supreme Court decision in case no. 67270 issued January 14, 2016 identified as Terra Contracting, Inc., Appellate, vs. Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and State of Nevada, Respondent. Counsel asserted the facts of the case before the Board and Nevada Supreme Court ruling support the NVOSHES case. She argued **employer knowledge** of the violative supervising conduct of foreman Cortez must be imputed to the respondent to the burden of proof element. Counsel argued the respondent employer here was involved with three previous violations involving company foremen who were not tied off or failed to enforce fall arrest protection by employees subject of their supervision. The employer must be charged with **foreseeability** because the foremen they hire are not enforcing OSHA fall arrest standards or company safety policies, therefore the proof element of employer knowledge imputed constructively.

Complainant counsel further argued the defense of employee misconduct must fail because there was no showing of meaningful safety rule enforcement, or discipline by the respondent. The four factors required to support the recognized defense were not proven.

Respondent presented closing argument through Safety Manager Kelly. He referenced Exhibit A and identified various of the materials presented. He argued the recognized elements to warrant reliance upon the recognized defense of **unpreventable employee misconduct** had been met as identified in the documentary evidence at Exhibit A. He further asserted the Nevada Supreme Court case in Terra prevents imputation of

supervisory employee misconduct to the employer as there was no way for respondent to know foreman Cortez would not enforce the standard subject of the company safety policies and training. Mr. Kelly acknowledged the company had previous difficulties enforcing with fall arrest protection, but argued substantial retraining and improved safety enforcement was put in place before this incident; and those earlier conditions were addressed and resolved. He noted CSHO Lizarraga found no other violations at the worksite except the one subject of this citation. He asserted that was evidence the company was on a new and compliant path of enforcement.

The Board is required to review the evidence and recognized legal elements to prove violations under established occupational safety and health law.

> 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).
>
> NRS 233B(2) "Preponderance of evidence" means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact.
>
> NAC 618.788 (NRS618.295) In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Chief.
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> 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). (emphasis added)

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). (emphasis added)

NRS 618.625 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 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.**" (emphasis added)

NRS 618.635 provides in pertinent part:

Any employer who willfully or repeatedly violates any requirements of this chapter, any standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, may be assessed an administrative fine of not more than $70,000 for each violation, but not less than $5,000 for each willful violation. (emphasis added)

Proof elements required for a finding of violation were met as to applicability, noncompliant conditions, and exposure as demonstrated by the photographs in evidence corroborated by the employee written admissions. However, the required proof element of "**employer knowledge**" was not satisfied by complainant reliance upon the principle of imputation for **constructive** application. The case turned on the issue of employer knowledge based on **foreseeability** of the supervisor's failure to enforce the safety standard; and then if proven, whether the evidence could support the recognized defense of **unpreventable employee**

misconduct. (*See Terra* supra at page 5)

Employer knowledge is a critical proof element under occupational safety and health law. It must be proved through preponderant evidence to have occurred either directly or constructively.

> Actual knowledge is not required for a finding of a serious violation. Foreseeability and preventability render a violation serious provided that a reasonably prudent employer, i.e., one who is safety conscious and possesses the technical expertise normally expected in the industry concerned, would know the danger. *Chandler-Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723 (1976), *appeal filed*, No. 76-1645 (D.C. Cir. July 16, 1976); *Rockwell International*, 2 OSHC 1710, 1973-1974 OSHD ¶ 16,960 (1973), *aff'd*, 540 F.2d 1283 (6th Cir. 1976; *Mountain States Telephone & Telegraph Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15-365 (1973).

No actual employer knowledge was alleged or subject of evidence, therefore the Board must look to the recognized principles to support the required element constructively by imputation to the employer. Generally, violative employee conduct can be imputed to the employer, including that of a supervisory employee charged with the responsibility of enforcing company and OSHA safety standards. The theory is that a responsible employer who does not **actually know** of violative employee conduct should, through the exercise of due diligence, be aware, and therefore knowledgeable that employees are not complying with company safety policies and/or OSHA standards. Similarly, if a supervisory employee is involved in self-misconduct or failures to enforce safety compliance, that too can be subject of imputation under established Review Commission, Federal District Court, and Nevada law. *Division of Occupational Safety and Health vs. Pabco Gypsum,* 105 Nev. 371, 775 P.2d 701 (1989). *Terra Contracting, Inc. vs. Chief Administrative Officer of the Occupational Safety and Health Administration, et al., citing ComTran Grp., Inc. V. U.S. Dep't of Labor, 722 F.3d 1304, 1316 (11 Cir.*

2013)[1] The Nevada Supreme Court in *Terra, supra* established the legal guidance for when and how supervisory employee misconduct, whether his own or by employees for whom he is charged with supervisory responsibility, can be by imputed to the employer. *Terra,* pages 3, 4.

Here the supervisory employee foreman, Mr. Cortez, was observed, photographed and admitted neither he nor employee Betancourt whom he was supervising were "tied off." To impute **knowledge** of the supervisory violative conduct to the employer as proof of the element of "**employer knowledge**" requires preponderant evidence. Accordingly, the evidence must establish the employer should have **foreseen** and therefore constructively **known** foreman Cortez was not or would not perform the job tasks assigned, which included assuring he and all employees supervised observed the company safety rules, training and OSHA standards.

In applying the facts in evidence to the rationale set forth by the Nevada Supreme Court in *Terra, supra*, there was insufficient competent preponderant evidence of foreseeability on the part of the respondent employer upon which to base imputed employer knowledge of violation of the cited standard. Complainant counsel asserted in closing argument, but offered no evidence, that the employer had previously engaged foremen to supervise its jobs in the past who failed to enforce fall arrest safety requirements. However the Nevada Supreme Court in *Terra* requires specific supportive preponderant evidence to establish constructive employer knowledge.

> The Third, Fourth, Fifth, Tenth, and Eleventh Circuit Courts of Appeal have concluded that, with respect to supervisor violations of federal occupational safety and health law, "'**employer**

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[1]Attached as Addendum A due to the recent issuance but not current publication.

> **knowledge must be established, not vicariously through the violator's knowledge**, but by either the employer's actual knowledge, **or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'"** *ComTran Grp., Inc. v. U.S. Dep't of Labor,* 722 F.3d 1304, 1316 (11th Cir. 2013) (alterations in *ComTran Grp.*) (quoting *W.G. Yates & Sons Constr. Co. Inc. v. Occupational Safety & Health Review Comm'n,* 459 F.2d 604, 609 n.8 (5th Cir. 2006)); *see Penn. Power & Light Co. v. Occupational Safety & Health Review Comm'n,* 737 F.2d 350 (3d Cir. 1984); *Mountain States Tel & Tel. Co. v. Occupational Safety & Health Review Comm'n,* 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. Sec'y of Labor,* 594 F.2d 396 (4th Cir. 1979); *see also Century Steel,* 122 Nev. At 589, 137 P.3d at 1158-59 (looking to federal decisional law in interpreting similar provisions in the NOSHA). (*Terra, supra* page 3) (emphasis added)

The Nevada Supreme Court in *Terra* went on to provide:

> In this case, NOSHA put on **no evidence of foreseeability** as to violation . . . relying solely on the supervisor's own misconduct to impute knowledge, and thus Terra was not even required to present rebuttal . . .. *ComTran Grp.,* 722 F.3d, supra. (*Terra, Supra,* page 4) (emphasis added)

Similarly, in the case before the Board, there was no competent or preponderant evidence of foreseeability that the employer could or should have known its supervising foreman employee Cortez would not comply or enforce OSHA standards and company safety policy.

There was no competent evidence, the employer had previously engaged foremen to supervise its jobs who failed to enforce fall arrest safety requirements. The previous violation at Exhibit 1, page 68 submitted as evidence to support a finding of "**repeat**" under different facts is not **preponderant** evidence to support constructive imputation of employer knowledge relying upon foreseeability that this employer should have known that foreman Cortez would not enforce tie off. *Terra Contracting, Inc. vs. Chief Administrative Officer of the Occupational*

Safety and Health Administration, et al., ComTran Grp., Inc. V. U.S. Dep't of Labor, 722 F.3d 1304, 1316 (11 Cir. 2013)

Respondent raised and argued the required defense of **unpreventable employee misconduct.** Notwithstanding the Board findings of no violation based upon the lack of proof of employer knowledge permitted by imputation to satisfy the complainant's burden of proof, the Board could rule similarly to find no violation even if a prima facie had been established based upon evidence of the defense of unpreventable employee misconduct.

The burden of proof rests with OSHA under Nevada law (NAC 618.798(1)); 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).

To establish the affirmative defense of "unpreventable employee misconduct," the employer must prove four elements: (1) established work rules designated to prevent the violation, (2) adequate communication of those rules to the employees, steps taken to discover any violations of those rules, and (4) effective enforcement of those rules after discovering violations. *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982); *see Pabco Gypsum,* 105 Nev. at 373, 775 P.2d at 703, *Terra, supra.*

In the subject case, unrebutted evidence at Respondent Exhibit A, although documentary in nature and not subject of witness testimony, but only argument of counsel, established a recognized safety plan upon which the respondent is entitled to rely in asserting the defense of employee misconduct. The Exhibit established **"work rules designated to prevent violation."** The evidence of training and references at

respondent's Exhibit A demonstrated **adequate communication of the rules to its employees.** The programs identified to discover violations and enforce the rules were either directly set forth or reasonably inferred from the documentation.

The respondent evidence at Exhibit A permits reasonable inference from the documentary evidence for support of its opposing argument that the employer had, after previous violations, embarked upon a course of retraining and enforcement, to substantially reduce or eliminate past practices, and must be given due weight under the facts and evidence presented. Further CSHO Lizarraga testified he found no other violations by respondent employer at the worksite both initially and after reinspection.

> Evidence that the employer effectively communicated enforced safety policies to protect against the hazard **permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not foreseeable or preventable.** (emphasis added) *Austin Bldg. Co. v. Occupational Safety & Health Review Comm.*, 647 F.2d 1063, 1068 (10th Cir. 1981). When an employer proves that it has effectively communicated and enforced its safety policies, serious citations are dismissed. *See Secretary of Labor v. Consolidated Edison Co.*, 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan. 11, 1989); *Secretary of Labor v. General Crane Inc.*, 13 O.S.H. Cas. (BNA) 1608 (OSHRC Jan. 19, 1988); *Secretary of Labor v. Greer Architectural Prods. Inc.*, 14 O.S.H. Cas. (BNA) 1200 (OSHRC July 3, 1989).
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> *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).
>
> OSHA must also prove that the **employer actually**

> **knew, or could have known with the exercise of reasonable diligence, of the physical circumstances that violate the Act.** This element must also be proved in general duty clause cases. The element requires OSHA to establish the **employer's actual or constructive knowledge of the physical circumstances that comprise the violation.** OSHA is not required to show that an employer knew the conditions violated the Act or posed hazard to employees. E.g., *New York State Elec. & Gas Corp. v. Secretary of Labor,* 88 F.2d 98, 105, 17 OSH Cases 1650 (2d Cir. 1996); Pennsylvania Power & Light Co. v. OSHRC, 737 F.2d 350, 11 OSH Cases 1985 (3d Cir. 1984); *Ragnar Benson Inc.,* 18 OSH Cases 1937, 1939 (Rev. Comm'n 1999); *Continental Elec.,* 13 OSH Cases 2153, 2154 (Rev. Comm'n 1989). (emphasis added)
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> 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.** (emphasis added) 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)
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> 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)
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> . . . 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 controlling cases have widely recognized the employer defense for the **unforeseeable** disobedience of an employee who violates the specific duty clause. Further, the Nevada Supreme Court has made it clear that the element of **employer knowledge** is a critical factor in

OSHA construction violation cases. Without substantial preponderant evidence of foreseeability as an element for reliance upon constructive knowledge imputation to an employer of violative conduct by a supervising employee, this Board cannot confirm a violation.

The question must be asked, what more could an employer do than hire qualified people to supervise employees under an established company safety and training program expecting supervisory personnel to enforce those policies and practices. There must be preponderant evidence of ineffective supervisory conduct **known or which should have been known by a reasonably prudent employer** before this Board acting in accordance with Nevada law can impose violations upon employers. In the subject case, the facts and evidence do not provide a sufficient level of proof by a preponderance that the respondent employer here could or should have known that its enforcement policies would not be implemented by its supervising employee foreman Mr. Cortez.

The Board concludes, as a matter of fact and law, that no violation occurred and the proposed penalty denied.

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)(11) and the proposed penalty is 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 19th day of April 2016.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By /s/
JOE ADAMS, Chairman

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRA CONTRACTING, INC.,
Appellant,
vs.
CHIEF ADMINSTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND STATE OF NEVADA,
Respondent.

No. 67270

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying judicial review of an occupational safety and health matter. Eighth Judicial District Court, Clark County; Abbi Silver, Judge.

After respondent Nevada Occupational Safety and Health Administration (NOSHA) discovered an employee of appellant Terra Contracting, Inc., in an unprotected, excavated trench deeper than five feet, working under the supervision of Terra's competent person to install a concrete grease trap, NOSHA cited Terra for two serious violations, based on (1) 29 CFR § 1926.651(k)(2) ("Inspections. . . . Where the competent person finds evidence of a situation that could result in a possible cave-in, . . . exposed employees shall be removed from the hazardous area. . . .") and (2) 29 CFR §1926.652(a)(1) ("Each employee in an excavation shall be protected from cave-ins by an adequate protective

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ADDENDUM A

system. . . .").[1] The Nevada Occupational Safety and Health Review Board upheld the citations but recalculated the resulting fines, and the district court denied Terra's subsequent petition for judicial review. Terra then appealed.

When reviewing administrative NOSHA decisions, we consider legal questions de novo and assess whether factual determinations are based on substantial evidence. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 590, 137 P.3d 1155, 1158, 1159 (2006). Terra does not dispute that NOSHA established the first three elements needed to prove its prima facie case: (1) the cited standards are applicable; (2) the standards were violated; and (3) Terra employees had access to the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994); *see* NRS 618.625(2); NAC 618.788. Instead, Terra contends that NOSHA failed to prove the fourth and last factor, Terra's actual or constructive knowledge of the violations. *Atl. Battery Co.*, 16 BNA OSHC 2131; *see* NRS 618.625(2). Terra further asserts that, even if knowledge was shown, Terra proved its affirmative defense of unpreventable employee misconduct. *See Adm'r of Div. of Occupational Safety & Health v. Pabco Gypsum*, 105 Nev. 371, 373, 775 P.2d 701, 703 (1989).

Knowledge

With regard to both violations, the Board found that Terra had actual knowledge of the violative conditions through its competent person, who was present and supervising the employees in the trench. Generally,

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[1]NRS 618.295(8) provides that the federal regulations apply, as Nevada has not adopted an alternative standard.

the knowledge of a supervisor is properly imputed to the employer. *Id.* Terra argues, however, that the competent person's knowledge cannot be imputed here because doing so would impose strict liability on the employer, which is not permitted. Rather, Terra claims, NOSHA must show that the supervisor's actions were foreseeable or preventable by proving the employer's safety program inadequate.

The Third, Fourth, Fifth, Tenth, and Eleventh Circuit Courts of Appeal have concluded that, with respect to supervisor violations of federal occupational safety and health law, "'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'" *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316 (11th Cir. 2013) (alterations in *ComTran Grp.*) (quoting *W.G. Yates & Sons Constr. Co. Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604, 609 n.8 (5th Cir. 2006)); *see Penn. Power & Light Co. v. Occupational Safety & Health Review Comm'n*, 737 F.2d 350 (3d Cir. 1984); *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155 (10th Cir. 1980); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396 (4th Cir. 1979); *see also Century Steel*, 122 Nev. at 589, 137 P.3d at 1158-59 (looking to federal decisional law in interpreting similar provisions in the NOSHA). And here, NOSHA does not appear to dispute the standard urged by Terra but instead argues that the Board's knowledge finding was based on substantial evidence, pointing out that Terra's competent person was in the trench, the trench took 4-5 days to dig, and evidence of Terra's safety program contained little discussion on

trenches and no documentation of any safety inspections. Therefore, we conclude that the Board improperly imputed the competent person's knowledge of the violative condition to Terra with respect to violation 1. With respect to violation 2, however, the supervisor's knowledge was properly imputed because the supervisor did not engage in the violative conduct.

To the extent that NOSHA argues that the Board's failure to place the burden on it was harmless error, we disagree. As recognized by the Eleventh Circuit Court of Appeals under similar circumstances, such error is not harmless and unfairly burdens the employer with the task of identifying the exact evidence to rebut the agency's position without knowing the agency's arguments. *ComTran Grp.*, 722 F.3d at 1318. In this case, NOSHA put on no evidence of foreseeability as to violation 1, relying solely on the supervisor's own misconduct to impute knowledge, and thus Terra was not even required to present rebuttal. As a result, we reverse with respect to violation 1 (competent person's failure to remove employees from unprotected trench) and, in light of the clarified standard, remand for further proceedings.

Unpreventable employee misconduct

But imputation is permissible when it is not the supervisor's own conduct at issue, *ComTran Grp.*, 722 F.3d at 1314, and thus the competent person's knowledge was properly imputed to Terra with regard to violation 2 (employee in trench). *Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703; *Butch Thompson Enter., Inc.*, 22 BNA OSHC 1985 (No. 08-1273, 2009 (ALJ)). As a result, we must examine whether the Board's decision that Terra failed to prove its affirmative defense of unpreventable employee misconduct is based on substantial evidence. To establish the

affirmative defense of "unpreventable employee misconduct," the employer must prove four elements: (1) established work rules designed to prevent the violation, (2) adequate communication of those rules to the employee, (3) steps taken to discover any violations of those rules, and (4) effective enforcement of those rules after discovering violations. *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982); *see Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703.

The Board's decision that Terra failed to show these four requirements is supported by the record. Terra demonstrated that it had a basic safety course that addressed trenching and which its employees were required to attend and acknowledge understanding of upon employment and annually thereafter. Terra further conducted weekly safety meetings and asserted that it required its superintendents and foremen to conduct informal and formal, documented safety inspections daily, including the identification of high hazard areas, such as trenches more than five feet deep, and had safety specialists perform random inspections. Terra failed, however, to provide additional, targeted trenching safety instruction for its employees and failed to address trench safety at any of its weekly safety meetings, although the cited employees did receive such specific training after the incident. Terra further failed to produce written documentation, pursuant to its safety policy, of any onsite inspections, and thus it is unclear whether any such inspections were adequate to discover any violations of trench safety regulations. *See, e.g., Complete Gen. Constr. Co. v. Occupational Safety & Health Review Comm'n*, No. 03-4456, 2005 WL 712491, at *3 (6th Cir. Mar. 29, 2005) (concluding that the defense of unpreventable employee misconduct was not shown when the employer failed to ensure employees read safety

manual, held toolbox talks that failed to cover trenching or other safety material, and held supervisory safety training only annually). Thus, the district court properly denied judicial review with regard to violation 2, and that portion of its order is affirmed. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court so that it can remand it to the Board for further proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Saitta

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 15
Israel Kunin, Settlement Judge
Shumway Van & Hansen
Dept. of Business and Industry/
Div. of Industrial Relations/Henderson
Eighth District Court Clerk