

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD

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

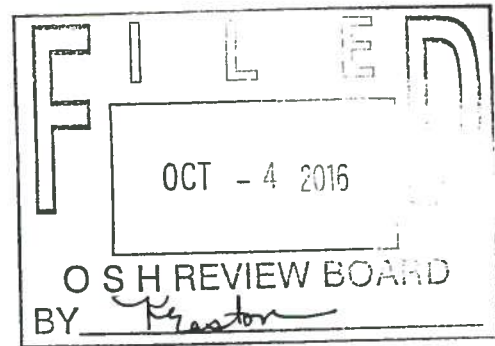
Docket No. LV 16-1852

Complainant,

vs.

DESERT PLASTERING, LLC,

Respondent,



11
12 **DECISION**

13 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**
14 **HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of August
15 2016, in furtherance of notice duly provided according to law, MS. SALLI
16 ORTIZ, ESQ., counsel appearing on behalf of the Complainant, **Chief**
17 **Administrative Officer of the Occupational Safety and Health**
18 **Administration, Division of Industrial Relations** (OSHA); and MS.
19 VIRGINIA TOALEPAI, Safety Director, appearing on behalf of Respondent,
20 **Desert Plastering, LLC**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
21 **BOARD** finds as follows:

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

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

27 Citation 1, Item 1, charges a violation of 29 CFR
28 1926.451(b)(1)(i), which provides:

1 29 CFR 1926.451(b)(1)(i) Each platform unit (e.g., scaffold
2 plank, fabricated plank, fabricated deck, or fabricated
3 platform) shall be installed so that the space between
4 adjacent units and the space between the platform and the
5 uprights is no more than 1 inch (2.5 cm) wide, except where
6 the employer can demonstrate that a wider space is necessary
7 (for example, to fit around uprights when side brackets are
8 used to extend the width of the platform).

9 NVOSHA alleged that on March 25, 2016, at approximately 10:00 a.m.,
10 at 10438 Blue Ivy Avenue, Las Vegas, Nevada, employees were observed
11 walking on a portion of the scaffolding that had gaps between the planks
12 exceeding one inch. The gaps were approximately 2-3 inches. The
13 employees were engaged in plastering operations. Employees were exposed
14 to possible serious injury in the event of a fall of approximately 15
15 feet to the ground.

16 Desert Plastering, LLC was previously cited for a violation of this
17 Occupational Safety and Health standard or its equivalent standard 29
18 CFR 1926.451(b)(1)(i), which was contained in OSHA Inspection Number
19 1086488, Citation Number 01, Item Number 01, and was affirmed as a Final
20 Order on 3/12/16.

21 The violation was classified as "Repeat/Serious". The proposed
22 penalty for the alleged violation was in the amount of \$5,400.00.

23 Citation 2, Item 1, charges a violation of 29 CFR 1926.501(b)(13),
24 which provides:

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

Note: There is a presumption that it is feasible and will not
create a greater hazard to implement at least one of the
above-listed fall protection systems. Accordingly, the

1 employer has the burden of establishing that it is
2 appropriate to implement a fall protection plan which
3 complies with 1926.502(k) for a particular workplace
4 situation, in lieu of implementing any of those systems.

5 NVOSHA alleged that on March 25, 2016, at approximately 10:00 a.m.,
6 at 10438 Blue Ivy Avenue, Las Vegas, Nevada, an employee was observed
7 working on a low sloped roof approximately fifteen (15) feet high, and
8 was not protected from falls by guardrail systems, safety net system,
9 or a personal fall arrest system. The employee was performing
10 plastering duties. The employee was exposed to possible serious fall
11 hazards such as, broken bones or possibly death.

12 The violation was classified as "Serious". The proposed penalty
13 was in the amount of \$3,200.00.

14 Complainant and respondent stipulated to the admission of
15 documentary evidence at complainant's Exhibits 1 through 3. During the
16 course of the hearing respondent and complainant stipulated to the
17 admission of respondent Exhibit A and portions of Exhibit B, referencing
18 specifically pages 5 through 10 only.

19 Complainant presented testimony and documentary evidence with
20 regard to the alleged violation through Mr. Scott Matthews, Compliance
21 Safety and Health Officer (CSHO). He testified as to his findings and
22 the citations issued to the respondent employer. Mr. Matthews
23 identified, and referenced during his testimony, Exhibits 1 through 3
24 as stipulated in evidence. He specifically referred to his inspection
25 narrative at Exhibit 1, pages 13-16 and discussions with Mr. Jesus
26 Mendez, who he identified as the job foreman. He also identified and
27 testified as the photographic exhibits at pages 56 through 63.

28 On or about March 25, 2016 CSHO Matthews conducted an inspection
in Las Vegas, Nevada identified as the worksite of Richmond American

1 Homes and all associated subcontractors. He met with Mr. Dariel
2 Borquez, a safety consultant, and Ms. Virginia Toalepai, safety
3 representative and president of World Wide Safety Inc. Both represented
4 Richmond American Homes and all associated subcontractors including the
5 cited employer, Desert Plastering. After entry was granted, Mr.
6 Matthews proceeded with his inspection. He referenced Exhibit 1, page
7 14 and confirmed his findings through testimony and paraphrasing of the
8 reported information as follows:

9 ". . . An employee was observed working on the
10 lower roof of a house on the 10438 Blue Ivy. The
11 section where the employee was observed working was
12 not protected by scaffolding/railing and the
13 employee was not wearing a fall protection harness.
14 The employee, Jesus Duran, stated during interview
15 that no fall protection harnesses were on site.
16 Mr. Duran stated the scaffolding system was put in
17 place by someone else in the company, and 'all we
18 do is plaster'. Mr. Duran stated the Foreman,
19 Jesus Mendez was aware of where he was working and
20 the conditions. Mr. Duran stated he was working
21 under those conditions for an hour. . . "

22 ". . . The foreman, Jesus Mendez, declined a formal
23 interview. Mr. Mendez stated that he and his crew
24 were not responsible for erecting the scaffold.
25 Mr. Jesus also revealed the crew are piece workers.
26 When asked how long he had worked for the company,
27 Mr. Mendez answered he worked 17 years. Mr. Mendez
28 had an OSHA-30 card dated 10/8/2015. Mr. Mendez
was aware of the hazard but felt he had no control.
At the end of the inspection, Mr. Mendez stated 'I
walk site from now on and not work if it's not
safe' . . . "

22 CSHO Matthews confirmed through Ms. Toalepai and Mr. Borquez and
23 during interviews with employees that the individuals observed and
24 photographed working were employed by the cited respondent Desert
25 Plastering, LLC.

26 CSHO Matthews further testified as to Citation 2, Item 1. He
27 explained that at the same location he observed employees using a
28 scaffold that was not fully planked. He identified his findings at

1 Exhibit 1, page 14 and paraphrased from those testifying as follows:

2 ". . . Two employees were observed working on
3 scaffolding that was not fully planked and had gaps
4 greater than one inch. Plasterer, Audencio Duran,
5 was observed working on the East side of the
6 structure on the lower level of the scaffold.
7 (Approximately five (5) feet high) The section of
8 the scaffold that he was working from was missing
9 a plank, exposing him to a possible fall hazard.
10 During interview Audencio stated that he was
11 working at the location for approximately one hour.
12 He also stated the foreman was supposed to walk the
13 site and identify safety issues. Plasterer Jesus
14 Duran, was observed walking on the top level of the
15 scaffold, approximately 15-20 feet high. Gaps
16 greater than one inch were observed in the section
17 he walked on. Jesus Duran stated he was not
18 responsible for the conditions of the scaffold as
19 the scaffolding system was put in place by someone
20 else in the company, and 'all we do is
21 plaster'. . ."

22 ". . . The foreman, Jesus Mendez, declined a formal
23 interview. Mr. Mendez stated that he and his crew
24 were not responsible for erecting the scaffold.
25 Mr. Jesus also revealed the crew are piece workers.
26 When asked how long he had worked for the company,
27 Mr. Mendez answered he worked 17 years. Mr. Mendez
28 had an OSHA-30 card dated 10/8/15. Mr. Mendez was
aware of the hazard but felt he had no control. At
the end of the inspection, Mr. Mendez stated 'I
walk site from now on and not work if it's not
safe'. . . "

19 CSHO Matthews referenced Exhibit 1, page 15 noting his closing
20 conference summary with Safety Director, Virginia Toalepai. He further
21 testified on his findings to establish violations and his consideration
22 of potential affirmative defenses. He referenced his findings and
23 confirmed the employer Desert Plastering **did establish work rules**
24 **designed to prevent the subject violation**, and further that the
25 **employers written safety program** was compliant. He further testified
26 that he **did not find evidence the safety rules were meaningfully**
27 **communicated to the employees**. Mr. Matthews specifically noted there
28 was no Spanish version of the written safety program, although Ms.

1 Toalepai informed him that ". . . all training has an interpreter
2 present." CSHO Matthews concluded that if an employee could not
3 understand English then the written version in only English would **not**
4 **satisfy the requirements for meaningful communication.** He further
5 testified that he found the employer did take steps to discover
6 violations, but could find no sufficient evidence to determine the
7 employer **effectively enforced the rules when violations had been**
8 **discovered.**

9 Mr. Matthews testified that his personal observations, and the
10 photographs in evidence established a violation of 29 CFR
11 1926.451(b)(1)(i) to show the **applicability to the standard** to the
12 subject work being performed, the **existence of non-complying conditions**
13 as demonstrated by the photographs, and **direct employee exposure** to the
14 hazards.

15 CSHO Matthews testified that Mr. Mendez was identified as the
16 foreman by individuals with whom he spoke at the site, and in particular
17 employee Duran. He further testified from Exhibit 1, page 27, that
18 confirmed Mr. Jesus Mendez was on the site at the time of the inspection
19 and in possession of an OSHA-30 card exhibiting a heightened awareness
20 of the hazards associated with the work the crew was performing.

21 Mr. Matthews concluded his inspection at the closing conference on
22 April 21, 2016 with Ms. Virginia Toalepai, Safety Director of Desert
23 Plastering, LLC. He testified that he advised her on behalf of the
24 employer of his findings from the inspection, including the violations
25 and proposed citations.

26 On cross-examination CSHO Matthews testified to a question
27 referencing his statement that Mr. Duran referred to Mr. Mendez as the
28 "boss" and reported in his notes at Exhibit 1, page 19, that the "boss

1 knew what I was doing . . ." and the meaning. He admitted that it was
2 possible that with reference to the "boss" may have been confused with
3 use of the Spanish word, but testified that to him it identified an
4 employee above his level of authority.

5 Complainant presented evidence from Mr. Gregory Drew who identified
6 himself as safety supervisor. Mr. Drew explained he is Mr. Matthews
7 acting supervisor because the previous supervisor has left Nevada OSHA.
8 He testified that he reviewed all the inspection reports, evidence,
9 testimony and exhibits involved with the case. He confirmed that based
10 on his education background and supervisory authority that the standard
11 was "applicable" to the subject worksite and that the building inspector
12 had reported employees were working on defective scaffolding. Mr. Drew
13 further testified as to employer knowledge element for confirming a
14 violation. He determined the finding of employer knowledge by
15 referencing Exhibit 1, page 23, paragraph 23. The information
16 previously subject of CSHO Matthews testimony confirmed the Exhibit 1,
17 paragraph 23 reference and responsibilities and identification of
18 employee Mendez as foreman.

19 CSHO Drew testified as to Citation 1, Item 1, noting the
20 applicability of the standard and satisfaction of the elements to find
21 a violation. He further identified the previous confirmed violation at
22 Exhibit 2, and referenced the prior violations at page 64. He testified
23 the previous violation met the enforcement manual requirements for
24 confirming utilization of same as the basis for a classification of
25 "Repeat" violation. He noted at page 78, settlement of a previous
26 violation at page 86. Mr. Drew testified at Exhibit 2, page 91 on the
27 worksheet confirming the conditions for a repeat violation. He noted
28 the repeat was utilized for calculation of the penalty because this was

1 the third violation of the same standard within two years and therefore
2 severity and gravity in evidence. He explained the classification and
3 calculation of the penalty as appropriate and valid in accordance with
4 the standards for enforcement guideline directives.

5 Mr. Drew testified that he reviewed the potential for an employee
6 misconduct defense but had no supporting evidence in the file to
7 establish "meaningful enforcement of the work rules when violations had
8 been discovered." At Exhibit 3, page 114, the disciplinary references
9 did not relate to the subject defenses. He testified Exhibit 3, page
10 116 showed the same employees written up for the same violation, but no
11 evidence of discipline in the records. On redirect Mr. Drew testified
12 that the training records in the file do not show any data or identity
13 for the employees for the subject violations having completed
14 retraining.

15 On cross-examination Mr. Drew testified he had been shown a copy
16 of a disciplinary report. Referencing respondent Exhibit A and B, Mr.
17 Drew testified there was some evidence of training but it was weak. He
18 could not verify the information came from competent witnesses so
19 credibility could not be confirmed. Mr. Drew testified there was merely
20 evidence of "some type of training records . . ." sent to Mr. Garrett,
21 but no evidence to confirm same. On continued cross-examination Mr.
22 Drew testified the notice of violation for Mr. Jesus Duran shows he had
23 been provided a written warning.

24 At the conclusion of complainant's case, respondent representative
25 presented testimony and documentary evidence to the cited violations.

26 Mr. Dariel Borquez identified himself as the Safety Consultant for
27 World Wide Safety Inc. On the day of the inspection and prior to
28 arrival of the CSHO he inspected the site and the subject scaffolding.

1 He saw there were gaps in the planking and found the scaffold was not
2 acceptable and required corrections. He testified that he informed
3 respondent employees that the planking and scaffolding needed to be
4 corrected before any work could be performed from the structure. He
5 further testified that he had no reason to believe the employees would
6 not correct the scaffolding.

7 On cross-examination Mr. Borquez admitted he specifically told Mr.
8 Duran to correct the scaffolding but never informed any person whom he
9 knew was in charge of the actual corrections. On re-cross-examination,
10 he testified that he had copies of the training documents, although not
11 in English, but that all employees received "hands on training . . . and
12 tests to show that they could build a scaffold . . ."

13 Respondent presented testimony from employees Ramon Castillo, Jesus
14 Mendez and Jesus Duran. All three employees testified with the
15 assistance of a court certified interpreter.

16 Mr. Castillo testified he is the respondent superintendent,
17 occupying that position for approximately 15 years. He testified that
18 he received no notice or call from the crew leader about any problem
19 with the scaffolding. Mr. Castillo further testified that Mr. Mendez
20 had no right or authority to "hire or fire . . . crew members;" and that
21 he (Mendez) was not a foreman nor given supervisor authority. Mr.
22 Castillo described Mr. Mendez as a "group leader" with no control to
23 stop work which is only vested in the company supervisors. He testified
24 that any employee has the right to stop **unsafe** work. Mr. Castillo
25 testified that Mr. Mendez had no authority to make any changes to the
26 work assignment.

27 On cross-examination Mr. Castillo testified Mr. Mendez is in charge
28 of the crew, guides their work, and if he found a hazard could stop the

1 employees from working. (Transcript testimony pages 95-98.)
2 Mr. Jesus Mendez Pacheco (aka Jesus Mendez or Mr. Mendez),
3 testified through a certified interpreter and identified himself as a
4 15 year employee of respondent, performing stucco work. He further
5 testified that he has been a "group leader" for 10 years. He described
6 his duties to first get all the equipment working and then do scaffold
7 inspection. Mr. Mendez testified that when CSHO Matthews asked him
8 questions on the day of the inspection about who was in charge he
9 responded that when Mr. Castillo was not present ". . . if something is
10 wrong, I have to fill in" He explained that he does not speak
11 English so did not fully understand CSHO Matthews. On questioning as
12 to why he had not inspected the scaffold on the morning of the OSHA
13 inspection, he testified that he was late that day but called his co-
14 worker (no longer employed by respondent) and told him not to start work
15 until he could get to the site. He testified the co-worker did not
16 follow his request explaining ". . . piece work . . . employees want to
17 move forward quickly . . . he didn't want to wait" Mr. Mendez
18 also testified that all employees have the right to stop work under
19 **unsafe conditions**. He was unaware the scaffold was not correct on the
20 morning of the OSHA inspection because he arrived late, which was not
21 a common occurrence for him. When questioned as to whether the
22 respondent does business in this (unsafe) way, Mr. Mendez responded
23 "no."

24 On cross-examination Mr. Mendez testified the company policy for
25 employees is to not commence work until a foreman or someone in charge
26 is at the jobsite. Mr. Mendez testified the employer provides safety
27 training classes. Mr. Mendez further testified that he received a
28 warning based upon his failure to pay attention to the scaffolding on

1 the worksite and note it was defective and taken out of service or
2 corrected.

3 On redirect examination referencing Exhibit A and asked if he
4 remembered seeing the page on his disciplinary action, Mr. Mendez
5 testified yes it was a warning, interpreted in Spanish, and he
6 understood it. On cross-examination he was asked what does "in charge
7 of employees mean." He responded ". . . to be sure work gets done
8" When asked ". . . Do you tell employees where they are supposed
9 to be working?" The answer was affirmative. On re-cross-examination
10 when asked if he understood that he allowed his employees to work
11 unsafely, Mr. Mendez responded ". . . I arrived late . . . and sometimes
12 things happen" (Transcript testimony pages 99-107.)

13 Mr. Jesus Duran Pacheco (aka Mr. Duran) testified through a
14 certified interpreter and identified himself as a 14 year employee of
15 respondent with the job title of laborer. He testified that he was
16 trained on fall protection and scaffolding in the Spanish language.
17 When asked if he understood the training, Mr. Duran testified yes. He
18 answered affirmatively to a question that Desert Plastering provides the
19 training and equipment for the type of work he is expected to do. Mr.
20 Duran testified he understood OSHA requires fall protection when working
21 at a height above six feet. He identified himself in the picture at
22 Exhibit 1, page 60 and answered affirmatively to a question of whether
23 he knew he'd exposed himself to the fall hazard. He further testified
24 that he was exposed for approximately 10 minutes. When asked why he did
25 not request proper fall protection, he responded "I didn't have time .
26 . . ." Mr. Duran testified he arrived on the site at 7:00 a.m. but was
27 waiting for Mr. Mendez before starting work. He admitted using the
28 scaffolding to get onto the roof as photographed by the CSHO before Mr.

1 Mendez arrived at the worksite. He further responded to a question of
2 whether the employer ever forced him to work unsafely to be faster,
3 responding "no." (Transcript testimony pages 108-111.)

4 In answer to a question on cross-examination as to the role of Mr.
5 Mendez, Mr. Duran testified he was "in charge of the group."

6 At the conclusion of complainant and respondent cases, closing
7 argument was presented by both parties.

8 Complainant counsel asserted the evidence was undisputed that the
9 first three elements required to prove a violation were established.
10 All focus was directed to a defense grounded on the lack of proof to
11 establish "**employer knowledge.**" At today's hearing respondent asserts
12 for the first time that Mr. Mendez is not a foreman and therefore his
13 knowledge and/or inaction cannot be imputed to the employer to meet the
14 required burden of proof. However, in answers given today directed to
15 whether he had "control" Mr. Mendez testified that he directed,
16 supervised and could stop work, but simply could not "hire or fire."
17 Counsel argued the evidence shows Mr. Mendez and the respondent gave
18 OSHA the impression that Mr. Mendez was in charge throughout this entire
19 matter, but only today made the assertion that he wasn't a "supervisory"
20 employee. However that is not supported by any other evidence nor
21 should it be accepted as credible. All four evidentiary elements to
22 establish a violation met the burden of proof.

23 As to Citation 2 on the training issue, the company did have a
24 safety training program, but it was not "effectively communicated to
25 employees" The program was not in the Spanish language and the
26 evidence not received until today when respondent presented Exhibits A
27 and B. The evidence presented at this late time is not credible, clear
28 nor preponderant evidence of compliance. There is no evidence

1 supporting the employee group testimony for any understanding of
2 training. There is no documentary evidence nor testimony to establish
3 "meaningful enforcement." Counsel further argued there is no
4 documentation of compliance nor evidence of discipline or uniform
5 effective enforcement. Counsel asserted a lack of credibility for the
6 documentation delivered at such a late date, and with "cut off" verbiage
7 in the copies. There is no supporting written documentation providing
8 proof to establish the employee misconduct defense. All four elemental
9 factors to establish the defense must be met under the respondent's
10 burden of proof.

11 Respondent presented closing argument. Ms. Toalepai asserted that
12 the case simply involved unpredictable employee misconduct. There was
13 no supervisory employee actually present to observe the working
14 conditions or hazards at the time the violations occurred. Ms. Toalepai
15 argued the evidence demonstrated Desert Plastering provided a written
16 safety program and training in the language that all employees
17 understood. She asserted the company maintained the established work
18 rules, conducted employee training, inspections, regular inspections,
19 unannounced inspections, and even disciplinary action to follow up. She
20 argued that whenever a violation is found, disciplinary action has taken
21 place along with retraining and corrective actions. Respondent
22 representative further asserted that the inspector, Mr. Borquez, had no
23 reason to believe that the corrections he instructed would not be made
24 after being brought to the attention of the only employee on the site.
25 Other employees were just arriving on the site. Ms. Toalepai concluded
26 asserting that all exposed employees in the subject matter, despite all
27 the training and equipment provided and available to them, simply
28 "blatantly disregarded and voluntarily exposed themselves to these

1 hazards . . ."

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

5 All facts forming the basis of a complaint must be
6 proved by a preponderance of the evidence. See
7 *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD
8 ¶16,958 (1973).

9 NRS 233B(2) "Preponderance of evidence" means
10 evidence that enables a trier of fact to determine
11 that the existence of the contested fact is more
12 probable than the nonexistence of the contested
13 fact.

14 NAC 618.788 (NRS618.295) In all proceedings
15 commenced by the filing of a notice of contest, the
16 burden of proof rests with the Chief.

17 To prove a violation of a standard, the Secretary
18 must establish (1) the applicability of the
19 standard, (2) the existence of noncomplying
20 conditions, (3) employee exposure or access, and
21 (4) that the **employer knew or with the exercise of
22 reasonable diligence could have known of the
23 violative condition.** See *Belger Cartage Service,
24 Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979
25 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);
26 *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC
27 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10
28 (No. 76-1408, 1979); *American Wrecking Corp. v.
Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir.
2003). (emphasis added)

19 NRS 618.967 provides: "**Supervisory employee"**
20 **defined.** "Supervisory employee" means any person
21 **having authority in the interest of the employer to**
22 **hire, transfer, suspend, lay off, recall, promote,**
23 **discharge, assign, reward or discipline** other
24 employees or responsibility to direct them, to
25 adjust their grievances or effectively to recommend
26 such action, if in connection with the foregoing,
27 the exercise of such authority is **not of a merely**
28 **routine or clerical nature but requires the use of**
independent judgment. The exercise of such
authority shall not be deemed to place the employee
in supervisory employee status unless the exercise
of such authority occupies a significant portion of
the employees workday. (Emphasis added)

27 A respondent may rebut allegations by showing:

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

1 2. The situation was **in compliance**; or lack of
2 access to a hazard. See, *Anning-Johnson Co.*,
3 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).
4 (emphasis added)

5 NRS 618.625 provides in pertinent part:

6 ". . . a **serious** violation exists in a place of
7 employment if there is a substantial probability
8 that death or serious physical harm could result
9 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)

10 NRS 618.635 provides in pertinent part:

11 Any employer who willfully or repeatedly violates
12 any requirements of this chapter, any standard,
13 rule, regulation or order promulgated or prescribed
14 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.

15 The required proof elements for findings of violations were met
16 without dispute as to elements of **applicability, noncompliant**
17 **conditions**, and **exposure** through the photographs in evidence
18 corroborated by credible employee **and** CSHO testimony as well as written
19 admissions. However the fourth required proof element of "**employer**
20 **knowledge**" was not satisfied through complainant reliance upon **actual**
21 **employer knowledge**, the principle of **foreseeability**, nor **imputation by**
22 **constructive** application.

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

26 **Actual knowledge** is not required for a finding of
27 a **serious violation**. **Foreseeability** and
28 **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

1 concerned, **would know the danger**. *Chandler-Rusche,*
2 *Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723 (1976),
3 *appeal filed*, No. 76-1645 (D.C. Cir. July 16,
4 1976); *Rockwell International*, 2 OSHC 1710, 1973-
5 1974 OSHD ¶ 16,960 (1973), *aff'd*, 540 F.2d 1283 (6th
6 Cir. 1976; *Mountain States Telephone & Telegraph*
7 *Co.*, 1 OSHC 1077, 1971-1973 OSHD ¶ 15-365 (1973).

8 No **actual** employer knowledge was alleged, subject of evidence and
9 without preponderant proof. There was no preponderant evidence to find
10 employer knowledge based on **foreseeability** that the employees who worked
11 for the company over extended periods of time, would disregard the
12 instructions of safety representative Borquez, nor violate their
13 training, retraining and/or personal safety requirements. The Board
14 must therefore look to the recognized principles under occupational
15 safety and health law to support the required employer knowledge element
16 **constructively** by imputation to the employer. Complainant asserted the
17 testimony and CSHO interview documentation at Exhibit 1 should be
18 accepted as proof that Mr. Mendez who was identified by the CSHO as a
19 foreman, is evidence of his status as a **supervisory employee** and
20 therefore **knowledge** of the employer established by imputation.

21 Nevada Revised Statutes at NRS 618.967 defines a "supervisory
22 employee" to mean:

23 ". . . any person having authority in the interest
24 of the employer to **hire transfer suspend lay off**
25 **recall, promote, discharge, assign, reward or**
26 **discipline** other employees or responsibility to
27 direct them, **to adjust their grievances** or
28 effectively to recommend such action, if in
connection with the foregoing, the exercise of such
authority is not of a merely routine or clerical
nature but requires the use of **independent**
judgment. The exercise of such authority shall not
be deemed to place the employee in supervisory
employee status unless the exercise of such
authority occupies **a significant portion** of the
employees workday." See NRS 618.967, *supra* at page
13. (Emphasis added)

1 The testimonial and documentary evidence provided no proof by a
2 preponderance or otherwise, that any references to Mr. Mendez as a
3 "foreman, crew leader, or lead man . . ." met the Nevada statutory
4 definition of a **supervisory employee** at NRS 618.967. The meaningful
5 critical criteria focus on the **right to hire, suspend, lay off,**
6 **discharge and/or discipline employees;** and the ability to **adjust**
7 **grievances** and oversee an employee not merely as a matter of a routine
8 but based on **independent judgment.**

9 The unimpeached employee testimony demonstrated that Mr. Mendez had
10 no authority to hire . . . suspend, layoff . . . discharge or discipline
11 employees. There was no evidence he used "independent judgment in a
12 supervisory status . . ." Construction companies commonly use terms
13 e.g. **team leader, group leader, lead man, head man, foreman,** or similar
14 descriptives to denote more experienced and responsible employees for
15 work crews to follow. However, there is a substantial distinction
16 between an authorized supervisor and an employee leader to establish the
17 critical role for responsibility under Nevada occupational safety and
18 health law. The specific statute at NRS 618.967 must be followed and
19 the unambiguous legislative intent recognized by this Board in a
20 challenge or review to find **supervisory employee** status.

21 The respondent employee witness testimony, while sometimes
22 confusing as interpreted from Spanish to English and/or explained, was
23 sufficiently credible on Mr. Mendez lack of **supervisory authority** as
24 defined at NRS 618.967. The testimony was neither impeached nor
25 rebutted. While CSHO Matthews testimony was credible, the limited
26 information he obtained at the worksite and testified to, did not prove
27 by preponderant evidence that Mr. Mendez occupied the role of
28 "supervisory employee" either under the facts in evidence or the

1 statutory definition.

2 The Third, Fourth, Fifth, Tenth, and Eleventh
3 Circuit Courts of Appeal have concluded that, with
4 respect to supervisor violations of federal
5 occupational safety and health law, "**employer
6 knowledge must be established, not vicariously
7 through the violator's knowledge**, but by either the
8 employer's actual knowledge, **or by its constructive
9 knowledge based on the fact that the employer
10 could, under the circumstances of the case, foresee
11 the unsafe conduct of the supervisor [that is, with
12 evidence of lax safety standards].**" *ComTran Grp.,
13 Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1316
14 (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 NIOSH). (*Terra, supra*) (emphasis added)

15 There was no preponderant or competent evidence of **actual** employer
16 knowledge nor through principles of **foreseeability** or **supervisory**
17 **employee imputation**. Accordingly, the necessary fourth element to prove
18 a violation under the complainant's burden of proof failed and the
19 violations must be denied.

20 Respondent also raised and argued the defense of **unpreventable**
21 **employee misconduct**. The Board findings of no violations based upon the
22 lack of proof of employer knowledge directly, foreseeable, or permitted
23 by imputation to satisfy the complainant's burden of proof, requires the
24 Board rule similarly and find no violations even assuming arguendo that
25 a prima facie case of violations was established. The Board finds
26 preponderant evidence to meet the respondent burden of proof for the
27 recognized defense of unpreventable employee misconduct.

28 **The burden of proof rests with OSHA under Nevada law (NAC**

1 618.798(1)); but after establishing same, the burden shifts to the
2 respondent to prove any recognized defenses. See *Jensen Construction*
3 *Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson Corp.*, 10
4 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

5 To establish the affirmative defense of "unpreventable employee
6 misconduct," the employer must prove four elements: (1) **established work**
7 **rules** designated to prevent the violation, (2) **adequate communication**
8 of those rules to the employees, (3) **steps taken to discover** any
9 violations of those rules, and (4) **effective enforcement** of those rules
10 after discovering violations. *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-
11 3491, 1982); see *Pabco Gypsum*, 105 Nev. at 373, 775 P.2d at 703, *Terra*,
12 *supra*. (Emphasis added) *Sanderson Farms, Inc. v. OSHRC*, 348 F.App'x 53,
13 57, 22 OSH Cases 1889 (5th Cir. 2009); *Burford's Tree, Inc.*, 22 OSH
14 Cases 1948, 1951-52 (Rev. Comm'n 2010).

15 In the subject case, the complainant evidence and testimony of CSHO
16 Matthews confirmed the employer **established work rules** designed to
17 prevent violations, and had **taken steps to discover violations**,
18 including retention of a professional safety consulting company. However
19 CSHO Matthews found respondent did **not adequately communicate** those
20 rules **nor effectively enforce** the rules when violations had been
21 discovered. However, respondent's Exhibits A and B, in conjunction with
22 the somewhat confusing but unrebutted and credible sworn testimony
23 offered **on these evidentiary elements of proof** by employees Castillo,
24 Mendez and Duran, through a certified translator, and that of Safety
25 Consultant Borquez established sufficient preponderant evidence to
26 complete the affirmative defense. The evidence of safety communication
27 and hands-on training by Spanish speaking individuals, and disciplinary
28 action under the training program were subject of documentary evidence

1 and corroborative testimony to support the defense. The evidence of
2 training at Exhibits A and B, supplemented the previous training data
3 confirmed as provided to Mr. Garrett and demonstrated adequate
4 communication and enforcement of the rules.

5 The facts in evidence portray a worksite where experienced, long-
6 standing employees simply failed to follow their training on the day of
7 inspection when group leader Mendez was late, notwithstanding the
8 morning inspections by independent safety representative Borquez and his
9 verbal instructions to Mr. Duran that the scaffold and safety conditions
10 must be satisfied before any use. The employees exposed themselves to
11 potential fall hazards. Strict liability for violative conduct cannot
12 be placed solely upon the employer when the evidence shows it undertook
13 reasonable measures to maintain safe working conditions. The evidence
14 demonstrated the employer had experienced difficulties with employee
15 OSHA compliance in the past and hired a professional safety consulting
16 company with a Spanish fluent representative to inspect, implement, and
17 enforce site safety.

18 *National Realty and Construction Co., Inc. v.*
19 *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973), is the
20 fountainhead case repeatedly cited to relieve
21 employers responsibility for the allegedly
22 disobedient and negligent act of employees which
23 violate specific standards promulgated under the
24 Act, and sets forth the principal which has been
25 confirmed in an extensive line of OSHC cases and
26 reconfirmed in *Secretary of Labor v. A. Hansen*
27 *Masonry*, 19 O.S.H.C. 1041, 1042 (2000).

28 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

1 employer. *Id.*, 1 O.S.H.C. at 1046. (emphasis
2 added)

3 The testimonial and documentary evidence further permits reasonable
4 inference in support of the respondent position that the employer had,
5 after previous violations, embarked upon a course of retraining and
6 enforcement, to substantially reduce or eliminate violative past
7 practices, and must be given due weight under the facts and evidence
8 presented.

9 Evidence that the employer **effectively communicated**
10 enforced safety policies to protect against the
11 hazard **permits an inference that the employer**
12 **justifiably relied on its employees to comply with**
13 **the applicable safety rules and that violations of**
14 **these safety policies were not foreseeable or**
15 **preventable.** (emphasis added) *Austin Bldg. Co. v.*
16 *Occupational Safety & Health Review Comm.*, 647 F.2d
17 1063, 1068 (10th Cir. 1981). When an employer
18 proves that it has effectively communicated and
19 enforced its safety policies, serious citations are
20 dismissed. See *Secretary of Labor v. Consolidated*
21 *Edison Co.*, 13 O.S.H. Cas. (BNA) 2107 (OSHRC Jan.
22 11, 1989); *Secretary of Labor v. General Crane*
23 *Inc.*, 13 O.S.H. Cas. (BNA) 1608 (OSHRC Jan. 19,
24 1988); *Secretary of Labor v. Greer Architectural*
25 *Prods. Inc.*, 14 O.S.H. Cas. (BNA) 1200 (OSHRC July
26 3, 1989).

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

. . . the 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 Board concludes, as a matter of fact and law, that no
violations occurred and the proposed penalties are denied.

1 It is the decision of the NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 REVIEW BOARD that no violation of Nevada Revised Statutes did occur as
3 to Citation 1, Item 1, 29 CFR 1926.451(b)(1)(i) and the proposed
4 classification and penalty is denied.

5 Further, there was no violation of Nevada Revised Statutes at
6 Citation 2, Item 1, 29 CFR 1926.501(b)(13) and the proposed
7 classification and penalty is denied.

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

18 DATED: This 4th day of October 2016.

19 NEVADA OCCUPATIONAL SAFETY AND HEALTH
20 REVIEW BOARD

21 /s/
22 By _____
23 JAMES BARNES, Chairman